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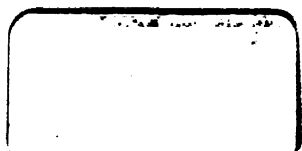
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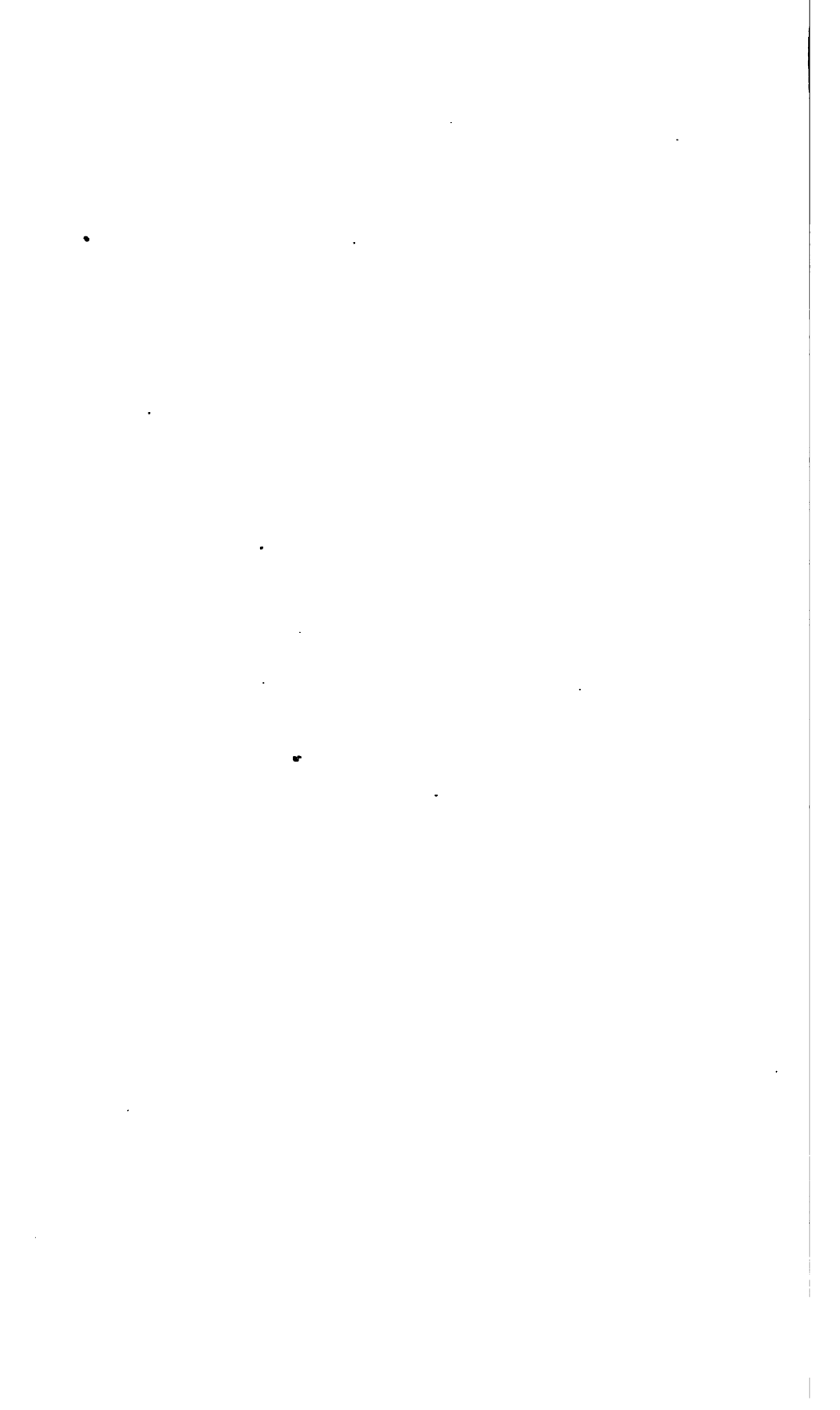




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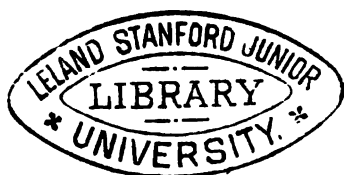
THE
AMERICAN
AND
ENGLISH
RAILROAD CASES

EDITED BY ADELBERT HAMILTON.

A COLLECTION OF ALL THE
RAILROAD CASES IN THE COURTS OF LAST RESORT IN AMERICA
AND ENGLAND

VOL. XXIV.

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NORTHERN PACIFIC R. Co.

v.

SHIMMELL.

(*Advance Case, Montana. January, 1886.*)

The franchise of the Northern Pacific R. Co. was given by act of Congress, and the road made a military and post road for the benefit of the government of the United States. Whatever is necessary and useful in operating the road belongs to and goes with the franchise, and no law of Montana Territory, or any other jurisdiction less than that which created it, can in any manner rightfully invade or impair the privileges and immunities thus conferred.

If an office safe at a depot on the road, in which the agent of the company deposits and keeps his daily receipts of money and valuable papers, is useful and facilitates the operation of the road, it cannot be seized on execution against the company. The finding of the jury, that the safe in question was not necessary or useful for such purpose, reviewed, and held contrary to the evidence.

APPEAL from the first district court of Custer County.

Sanders, Cullen & Sanders for the appellant.

WADE, C. J.—The only questions presented by this appeal are the following, viz.:

1. Does the evidence support the verdict and justify it?

2. Can the property of the Northern Pacific R. Co. ^{QUESTION STATED.} in the Territory of Montana, necessary, convenient, and usual for running and operating said road, be lawfully seized and sold on execution to satisfy a judgment against said company?

The property in question is a certain office safe, known as a Diebold combination safe, which was seized on an execution issued out of the probate court of Yellowstone county, and taken from the plaintiff's depot and station, at the town of Billings, in said county, and sold at auction, whereby the defendant claims title and right of possession. There was a verdict and judgment for defendant, and the plaintiff appeals.

As to the question whether the safe in controversy was a part of the usual, necessary, and convenient equipment of the ^{FACTS.} Northern Pacific R. Co., to enable it to operate its road, at the time it was seized on execution, the testimony showed that the safe was in use by the plaintiff in and about its business as a railroad

company, in the depot at Billings, and was the only safe there; that it was in daily use by the company in its railroad business thereat, in keeping therein the moneys received by the company which amounted to from two hundred to five thousand dollars per day, and in the preservation of its books of account of said railroad business at said station; that since the safe had been taken away the agent at Billings, in consequence of its seizure, had been compelled to use safes of other parties, by their consent, or else carry said moneys on his person, and in the opinion of said agent said safe was, under the circumstances, a necessary part of the equipment and furniture of the plaintiff at said depot. It also appeared in evidence that there was a bank in said town, with a vault, wherein plaintiff was permitted to deposit its moneys, books, and papers, and that the plaintiff had procured no other safe since the one in question was seized.

The foregoing was all the testimony at the trial concerning the questions proposed.

Upon this state of facts the court instructed the jury as follows:

"If it has been proved to your satisfaction, by a preponderance of evidence, that this safe was an office safe—was in use at the depot at this station—that it was a usual and necessary part of the furniture in such office, in the preservation and safe-keeping of the moneys, books of account, and valuable papers used in the transaction of the business of the plaintiff at such depot, and essential to the proper and safe conduct of such business there, then you should find for the plaintiff.

INSTRUCTIONS TO
JURY.

"In this case the question arises, whether the property can be seized under execution for the payment of the debts of the company, inasmuch as it is held to be essential to the ordinary and economical use of the railroad company. There are certain classes of property belonging to railroad companies not subject to seizure and sale upon execution, such as their tracks, rolling stock, depots, shops, and machinery, the use of which is essential to the operation of the road; the reason for this being that such seizure and sale would result in the destruction of the property.

"There are certain other classes of property which may be seized and sold upon execution against a railroad company, such as lands and personal property not used in the running and operation of the road. Such property is always subject to execution, and it is the duty of the sheriff to search for this kind of property upon which to levy. An office safe is a necessary part of the furniture in a town where the business is important and extensive, and where the receipts of the railroad company are of so large an amount, and the books required to keep the accounts of the office containing valuable memoranda, as that it would be proper and prudent to preserve them from depredation or destruction by the use of a safe.

"And in this case, if you find from the evidence the business here so extensive, the receipts so valuable, as that a prudent man would require the use of a safe, then you should find for the plaintiff."

These instructions correctly stated the law, and were applicable to the facts in the case. Rorer, in his work on railroads, PROPERTY NECESSARY TO OPERATION OF ROAD CANNOT BE TAKEN ON EXECUTION. vol. 2, p. 901, says: "The corporate franchise, rights, and property of a railroad corporation incidental thereto cannot at common law be seized or sold upon execution at law against the company; nor can the appurtenances, easements, appliances, or works used for the practical operation of the road be levied upon or sold at law upon execution separate from the franchise any more, or more legally than the whole can be sold together. Such sale would impair its value and impede its use by the public," citing the following authorities: *Gue v. Tide-water Canal Co.*, 24 How. 263; *Rorer on Judicial Sales*, sec. 1068; *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372; *Western Pa. R. Co. v. Johnston*, 59 Pa. St. 290; *Youngman v. Elmira & W. R. Co.*, 65 Id. 278; *Bayard's Appeal*, 72 Id. 453; *Thomas v. Armstrong*, 7 Cal. 286; *Stewart v. Jones*, 40 Mo. 140; *Hatcher v. Toledo, W. & W. R. Co.*, 62 Ill. 477; *James v. P. & G. R. Co.*, 8 Mich. 91; *Ammant v. New Alexandria & P. T. Co.*, 13 Serg. & R. 212; *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337; *Rorer on Judicial Sales*, sec. 1069.

In *Gue v. Tide Water Land Co.*, Chief Justice Taney says: "It would be against the principles of equity to allow a single creditor to destroy a fund to which other creditors had a right to look for payment, and equally against the principles of equity to permit him to destroy the value of the property of the stockholders, by dissevering from the franchise property which was essential to its useful existence."

In *Herman on Executions*, 551, it is said the rule and common law is, that the franchises and corporate rights of a corporation, and the means invested in them, which are necessary to the existence and maintenance of the object for which they are created, are incapable of being transferred and granted away by any adverse process against them.

The plaintiff has the right to operate its road through the Territory of Montana, and to have all the works and appliances essential to its useful existence as a railroad. This franchise was given by act of Congress, and the road made a military and post road for the benefit of the government of the United States, and whatever is necessary and useful in operating the road belongs to and goes with the franchise, and no law of the Territory, or any other jurisdiction less than that which created it, can in any manner rightfully invade or impair the privileges and immunities thus conferred. PLAINTIFF'S PRIVILEGE CANNOT BE IMPAIRED.

If an office safe at a depot, in which the agent deposits and keeps his daily receipts and valuable papers, is useful and facilitates the successful operation of the road, it could no more be seized on execution than could a section of the rails, or road bed, or a water-tank. These things are incidental to the franchise and cannot be disturbed. They are the means by which the franchise is exercised. They are the necessary instruments of its use.

The charter of the plaintiff authorizes and empowers it to lay out, locate, construct, furnish, maintain, and enjoy a continuous railroad line, with the appurtenances, from Lake Superior to Puget's sound, and if an office safe at any depot on said road is useful and convenient to the plaintiff in the enjoyment of said franchise, then the same is protected from seizure on execution. This franchise or right to maintain and enjoy the road is not limited and restricted to what is barely necessary for that purpose, but extends to what is appropriate and useful, and actually in use.

Railroad companies can be made to pay their debts, but the remedy is not by seizing and selling property that would destroy the road, and thereby prevent it earning money for its creditors.

The testimony shows, without question or contradiction, that this safe was an office safe, used by plaintiff in its depot at Billings station, in the regular daily business of the road, and that the same was a necessary part of the equipment and furniture of said depot for the purposes of such business. The court instructed the jury that if it had been proved by a preponderance of the evidence that the safe in question was an office safe, used in the depot at Billings, and that it was a usual and necessary part of the furniture in such office for the safe-keeping of moneys, books of account, and valuable papers, used in the transaction of plaintiff's business, and essential to the proper and safe conduct of such business, then they should find for the plaintiff.

The jury, by their verdict for the defendant, must have found from the evidence that the safe was subject to sale on execution, for the reason that the same was not a usual and necessary part of the equipment and furniture of said depot, and essential and proper to the safe conduct of the business of the road. There is no evidence to support such a finding or verdict. The verdict is a direct contradiction of all the testimony in the case.

The agent of the plaintiff testified that the safe, considering the business at the Billings depot, was a necessary part of the equipment and furniture of the depot for the purposes of such business, and there was no evidence to contradict the agent, or to call in question his statement as to the necessities of plaintiff's business at that point. But the jury, in answer to a special issue submitted, say that the safe in controversy

SEIZURE OF OFFICE SAFE ON EXECUTION.

VERDICT FOR DEFENDANT.

SAFE NECESSARY TO EQUIPMENT OF DEPOT.

was not necessary in carrying on the business of the company. In this they contradicted the only witness on the subject, and make a special finding in the very face of all the testimony on the question submitted.

Appellate courts are slow to disturb the verdict of a jury, and will not do so if there is evidence to support the verdict. *Ming v. Truett*, 1 Mont. 328. But if the verdict is a flat contradiction of all the evidence in the case, and there is nothing to support it, it would be a reproach to the law, and to those who administer it, to permit such a verdict to stand.

Judgment is reversed, and cause remanded for a new trial.

What Property of a Railroad can be taken in Execution.—The franchise of a railroad or other corporation cannot be subjected to sale on judgment and execution for its debts without legislative authority. *Hatcher v. Toledo*, etc., R. Co., 62 Ill. 477; *Bruffett v. G. W. R. Co.*, 25 Ill. 353; *Atkinson v. Railroad Co.*, 15 Ohio St. 21; *Young v. Railroad Co.*, 65 Pa. St. 278; *W. R. Co. v. Johnson*, 59 Pa. St. 295; *Gue v. Canal Co.*, 24 How. 263; *Wood v. Turnpike Co.*, 24 Cal. 474. The franchise of a corporation is held to be a privilege, granted and held in personal trust, and cannot be transferred by forced sale, or by voluntary assignment, except by permission of the government, and when that permission is granted the mode of transfer pointed out must be followed. *Wood v. Truckee Turnpike Co.*, 24 Cal. 474.

The land of a railroad company beyond what is actually dedicated to corporate purposes is bound by the lien of judgments against the corporation, and is liable to be levied upon under execution and sold by the sheriff as is the land of any other debtor; but the purchaser at such sale takes only that which is not necessary for the full enjoyment and exercise of the corporate franchise, no matter how the land may have been acquired by the corporation. *Plymouth R. Co. v. Colwell*, 89 Pa. St. 847; see also *Ammant v. New Alexandria*, etc., Turnpike Co., 18 S. & R. 212; *Youngman v. Elmira*, etc., R. Co., 65 Pa. St. 278.

In those States in which the rolling stock used in operating the road is considered to be affixed to the realty, and as such to pass under a mortgage of the railroad, it is not subject to levy or sale upon execution. *Macon*, etc., R. Co. v. *Parker*, 9 Ga. 877; *Coney v. Pittsburg*, etc., R. Co., 8 Phila. (Pa.) 173; *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465. But in other States such property is treated as personalty, and as such is subject to levy and sale upon execution. *Randall v. Elwell*, 52 New York, 521; *Hayle v. Plattaburg*, etc., R. Co., 54 N. Y. 314; *Stevens v. Buffalo*, etc., R. Co., 31 Barb. 590; *Williamson v. New Jersey*, etc., R. Co., 29 N. J. Eq. 811; *Boston*, etc., R. Co. v. *Gulmore*, 87 N. H. 410; *Coe v. Columbus*, etc., R. Co., 10 Ohio St. 372.

In the case of *Coe v. Columbus*, etc., R. Co., *supra*, the court, after deciding that locomotives, cars, etc., should be considered as personalty, says: "We have no hesitation in coming to the conclusion, that what we have described as the personal property of the corporation, employed in the use of its road and franchise, is liable for the payment of its debts. We think the line can be clearly drawn between the interest in real estate and the franchise connected therewith, and the movable things employed in the use of the franchise."

In *Titus v. Mabee*, 25 Ill. 257, it was held that an iron safe was liable to be taken in execution against a railroad company owning it; also a planing-mill not attached to the freehold.

HOLMAN *et al.*

v.

STATE *ex rel.* GIBSON.*(Advance Case, Indiana. March 12, 1886.)*

Where the State, by an information in the nature of a *quo warranto*, directly challenges the right of certain parties to act as a railway corporation, and it appears that many of the subscribers for the stock were notoriously insolvent, and had no expectation, at the time they subscribed, of ever paying their subscription, thus leaving the amount subscribed in good faith less than that required by the statute, a judgment of forfeiture is proper.

APPEAL from Huntington circuit court.

L. M. Ninde and *T. E. Ellison* for appellants.

C. W. Watkins and *Milligan & Whitelock* for appellee.

MITCHELL, J.—The State, by an information in the nature of a *quo warranto*, charged that William J. Holman and 10 others were assuming to act as a corporation under the name of the Fort Wayne, Warren & Brazil R. Co.; that, as such corporation, they FACTS. were making contracts, incurring debts, soliciting aid from townships, towns, and cities, making surveys, appropriating lands, etc., without any warrant or authority of law. They were challenged to show by what authority they assumed so to act. By a special answer the defendants admitted they were acting as a railway corporation, and alleged that they were duly organized and incorporated under the law. With their answer they exhibited a copy of their articles of association, which they averred had been duly filed in the office of the Secretary of State. Upon the articles thus exhibited it appeared that 15 persons had each subscribed for \$3400 of the capital stock, the whole amount of which was fixed at \$60,000. A reply was filed admitting the signing and filing of the articles of association, and the subscription to the stock. It was, however, averred that many of the subscribers to the stock were, at the time of making such subscriptions, wholly and notoriously insolvent, and made no pretence of being able to pay their subscriptions, and that others of such subscribers were not worth half the amount subscribed by them; that the solicitor of the subscriptions, and promoter of the corporation, was a subscriber to the stock, was wholly and notoriously insolvent himself, and knew of the insolvency of many of the other subscribers; that one of the subscribers, in addition to being insolvent at the time of making his subscription, was also a minor, which was known to the promoters of the scheme. It was further charged that the capital stock had not been subscribed in good faith, but that the subscrip-

tions were received for the purpose of securing a colorable organization to be made on paper. Evidence was offered tending to prove the averments contained in the reply. A judgment of forfeiture was rendered.

The statute providing for the organization of railroad corporations enacts, in substance, that, whenever stock to the amount of at least \$50,000, or \$1000 for each and every mile of proposed road, shall have been subscribed, any number of the subscribers, not less than 15, may, under certain regulations prescribed, form a railroad corporation. The question presented for consideration is, must the \$50,000 of stock, which is required to be subscribed as a condition precedent to the organization, be subscribed in good faith by persons who had a reasonable expectation that they will be able to pay, or will subscriptions, some of which are merely simulated, fulfil the purposes of the statute? Where the information is against the corporation *eo nomine*, an inquiry such as that proposed cannot be made. In such a case the bringing of the suit against the corporation in its corporate name is an admission of its corporate existence, and it is not necessary for the corporation to show that it had performed the conditions precedent to its corporate existence. High, Extr. Rem. § 661. So, also, where the question of the regularity of the organization is made in a collateral proceeding, it is not admissible to show the insolvency of subscribers to the stock. It was accordingly held in *Miller v. Wildcat Gravel Road Co.*, 52 Ind. 51, that in a suit upon an unconditional subscription of stock evidence of the insolvency of some of the subscribers was immaterial. There are cases which hold that an assessment against a subscriber to stock cannot be collected until at least the minimum amount required by the statute has been subscribed by persons apparently able to pay for the shares subscribed. In such cases the subscriptions of insolvent persons, infants, and married women are not counted. *Railroad Co. v. Bolton*, 48 Me. 451; *Phillips v. Bridge Co.*, 2 Metc. (Ky.) 219; *Mor. Priv. Corp.* § 279; *Pierce R.* 55 and notes. The fact that some of the subscribers to the stock of a corporation become insolvent after such subscriptions are made will not of itself support an information in the nature of a *quo warranto*. *State v. Bailey*, 16 Ind. 46.

The case before us is an information by the State challenging the right of certain individuals to act as a corporation, and asserting that, by reason of the colorable character of the subscriptions, they never became an incorporation. It is therefore a direct inquiry on behalf of the State, calling upon the individuals named to show by what authority they assume to act as a corporation. In such case, while it may be sufficient *prima facie* to show the filing of articles of association, and a subscription of the minimum amount of stock required by law, we do not think

such showing is conclusive upon the State. It is true, the statute does not in terms prescribe that the subscriptions must have been made in good faith, or that the subscribers must have been at the time of making their subscriptions solvent, and apparently able to pay. But it must be implied that, at least between the State and the persons to whom the privilege of erecting themselves into a

**SUBSCRIBERS
MUST BE RE-
SPONSIBLE.**

corporation is granted, good faith and fair dealing should be observed. Merely simulated subscriptions, made by persons who are neither actually nor apparently able to pay the amount subscribed, cannot answer the purpose of the statute. Such subscriptions are shams, and are to be denounced as a fraud upon the law. They are an attempt to acquire corporate functions, not by a compliance with the law, but by a disingenuous evasion of it. *Jersey City Gas Co. v. Dwight*, 29 N. J. Eq. 242. Such subscriptions must stand upon the same basis, and be determined upon the same considerations, that govern any other business transaction. It cannot be doubted that a person may in good faith become a subscriber to the stock of a corporation, as he may become the purchaser of goods, for a sum larger than he is then able to pay, and more than he is at the time actually worth in property. But such a subscriber must have subscribed in good

**SUBSCRIPTION
MUST BE IN
GOOD FAITH.**

faith, with a reasonable expectation and an apparent prospect of being able to pay assessments on his stock as they might thereafter be called for. Where, however, a subscriber is both insolvent, and has no prospect or expectation of being able to pay, and such subscription is taken with knowledge, it cannot be counted in making up the minimum required by statute. Where articles of association were tendered with a subscription of \$50,000 to the capital stock by 15 persons, it was a representation that that amount was pledged and available as necessity might require. Upon the faith of that representation, the State authorized the persons making it to assume the functions and franchises of a corporation. On the same principle that one individual may reclaim his property which has been sold to another who is insolvent, and who had at the time no intention to pay or prospect of being able to pay for it, may the State reclaim the privilege granted by it under like circumstances. Standing by until important interests were acquired by the corporation might estop the State, or lapse of time might cure the defect in the organization. *Sleeth v. Gordon*, 87 Ind. 171.

Nothing of that kind is either pleaded or proved in this case. It is abundantly established by the evidence that most of the subscribers to the stock had not only neither the ability, actual or apparent, at the time they subscribed to pay any calls, but it appears further that they had no purpose or expectation that they would be called upon to pay, or that they could pay anything, if called upon. As a condition to its assent to the

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SUBSCRIBERS.**

grant of corporate powers to a railway company, the State requires that an available capital of at least \$50,000 shall be provided as a security for persons with whom the corporation proposes to transact business, and as a guaranty that it will prosecute the proposed work. If obtaining merely feigned subscriptions puts it beyond the power of the State to withdraw its assent, then it is within the power of designing persons to obtain the franchise of a corporation by a merely pretentious compliance with the law, and by that means exclude others who might execute a beneficial public improvement, while the existing corporation is wholly unable to do anything except to harass those who may be induced to deal with it.

We think the evidence sufficiently shows that the defendants held themselves out as a corporation.

The judgment is affirmed, with costs.

ZOLLARS, J., did not participate in the decision of this case.

MONTGOMERY SOUTHERN R. Co.

v.

MATTHEWS.

(77 Alabama, 367.)

The mere expression of an opinion cannot be a fraudulent representation, unless falsely made, with intent to deceive, and actually deceiving; nor can it constitute a fraud, vitiating a contract thereby procured, when it relates to a matter equally open to both parties.

A subscription to the stock of an incorporated railroad company, procured by the fraud of the company's agent soliciting subscriptions, may be defeated on the plea of fraud, when the company attempts to enforce it by suit.

There are cases of fraud, and other unlawful acts, particularly acts of the same general character continuous in their nature, where it is permissible to prove other similar transactions occurring at or about the same time, as shedding some light on the particular transaction in controversy; but, in an action against a subscriber for stock in a railroad company, who defends on the ground of fraudulent representations by the company's agent in procuring his subscription, he cannot be allowed to prove similar representations made by said agent to other subscribers in the same neighborhood.

A statement as of fact by the vendor of an article, on which the purchaser has a right to rely, and on which he does rely, purchasing on the faith of it, constitutes, if false, a good defence to an action for the purchase-money, though not known by the seller to be false; and this, not on the ground of fraud, but of failure of consideration; but this principle does not apply to a statement which is merely the expression of an opinion.

Representations by the agent of a railroad corporation, soliciting subscriptions for stock from persons living along the contemplated route of the road, as to its intended location, and the time within which it will be com-

pleted to a particular place, are but the mere expression of an opinion, and neither constitute a fraud, nor are available as a defence to an action on a subscription for stock made on the faith of them, unless known by the agent to be false, and made by him with intent to deceive.

Although an action on the defendant's subscription for stock cannot be defeated on the ground of fraud, when the representations of the corporation's soliciting agent were merely the expression of an opinion as to the probable location and completion of the road; yet, if the agent further represented that the money subscribed would be refunded unless the road was so located and completed, and he was authorized to make these representations, the action will, it seems, be enjoined in equity, on proof of the insolvency of the corporation and its abandonment of the work before completion.

APPEAL from the Circuit Court of Crenshaw.

Tried before the Hon. H. D. Clayton.

This action was brought by the appellant, a domestic corporation, against Eli Matthews and M. T. Matthews; was commenced on the 14th February, 1883, and was founded on a writing signed by the defendants, which was in these words:

"Crenshaw County, Ala., July 26th, 1881. On the first day of December, 1882, we promise to deliver to the Montgomery Southern R. Co. two bales of middling cotton, of 500 lbs. each, at the Alabama Warehouse in the city of Montgomery, the proceeds of which is to be credited to our account, as payment upon two shares of the capital stock in said railway company subscribed by us; and in case we make default in the delivery of said cotton, or any part thereof, as above provided, then we hereby agree to pay to said Montgomery R. Co., in money, the market price of such cotton in said city of Montgomery on said day; and to secure the faithful performance of this contract, we hereby waive all exemptions to which we are or may then be entitled under the laws or constitution of this State."

The complaint set out this instrument, averred the failure of the defendants to deliver the cotton as stipulated, whereby they became liable to pay the money as specified, and claimed the money, with interest. The defendants pleaded the general issue, and several special pleas, some of which alleged that the writing sued on was void for fraud, having been procured by the false representations of the plaintiff's agent. These representations were stated in the several pleas in these words: (3) "Before the making and the execution of said note by these defendants, the said plaintiff's agent, who was M. L. Kirkpatrick, represented to these defendants that the said railroad, for stock in which the said note was given, would run near his land, within from one to two miles thereof, substantially along the 18th range line, and would be built within two years from the date of said note, to a point near Rutledge, and below the lands of these defendants; and defendants aver that more than two years have elapsed since the making of said note, and that plaintiff has not built or run said railroad near the land or place of business

of these defendants; nor has said road been built to a point near Rutledge, and below the lands of these defendants; and said representations were false and fraudulent, and without these representations they would not have given said note." (4) "Said note is void of fraud, in this: That at and before the execution of said note by these defendants, M. L. Kirkpatrick, who was the plaintiff's agent, represented to these defendants that said railroad would be built to Rutledge, or within three miles of Rutledge, within two years at furthest from the date of said note; and defendants aver that, believing said representations to be true, and relying on the same, they made and executed said note," etc.; with the additional averment that said road was not so built, and said representations were fraudulent. (5) "That said note was procured by the false and fraudulent representations of M. L. Kirkpatrick, who was at the time the plaintiff's agent in procuring subscriptions to the capital stock of said corporation, in this: Said Kirkpatrick represented to these defendants, before they signed said note, that said railroad would be built to Rutledge, or within three miles of Rutledge, in said county of Crenshaw, within two years at furthest from the date of said note, and would be built on, or substantially on the 18th range line, and that said road would run near the lands of these defendants;" which representations, it was further averred, were false and fraudulent, but were believed by defendants to be true. The 6th, 7th, 8th, and 9th pleas set up a failure of consideration; alleging, in varying phraseology, that the consideration was the location and completion of the road according to the representations of plaintiff's said agent, and that the road had not been so located and completed.

The plaintiff demurred to these special pleas, assigning numerous grounds of demurrer to each: to the 3d, nine; to the 4th and 5th, twenty-nine; and to the 6th, 7th, 8th, and 9th, the same as to all the former. One of the causes of demurrer specially assigned to each plea was, "that the representations set up as a bar to plaintiff's right to recover were mere matters of opinion of said agent." The court overruled the demurrers, on all of the grounds specially assigned, and issue was joined on all of the pleas.

On the trial, as appears from the bill of exceptions, the defendants thus testified in their own behalf: "At the time said obligation now sued on was executed by them, they met said Kirkpatrick (who, it was proved, was plaintiff's agent to solicit subscriptions to the capital stock of said corporation) in the public road, and he began to solicit subscriptions from them for said road. Defendants declined to take any stock, and said that they did not care for a road over in the mud in Montgomery county; that they did not want to go through the mud a part of the way, and did not feel able to pay for others to enjoy the road; but that they were willing to subscribe for stock, upon the condition that they were not

to pay anything until the road was built to Rocky Mount, or the county line between Montgomery and Crenshaw counties. Kirkpatrick then stated that he was satisfied the road would be built to Rocky Mount within a short time, and would be built to Rutledge, or within three miles of Rutledge, within eighteen months, or two years; that the way to get the road was to put all the little sums together, and let the president and officers of the road see that we wanted it, and it would be built; that he knew Dr. LeGrand and Uncle Joe, and the road would be built. Defendants then stated, that they wanted the condition inserted in the contract, that they were not to pay anything until the road reached Rocky Mount; and Kirkpatrick replied, that the road would be built to, or within a mile of Rocky Mount, by the time the note fell due, and would be built to Rutledge, or near there, within eighteen months, or two years; that if it was not built to Rutledge, or near there, the people in Crenshaw county who subscribed should have their money back; and that the road would be built along the 18th range line, which was within a mile or two of their lands. Kirkpatrick also pulled out a large bundle of contracts for stock, named several parties who had taken stock, and said that he wanted to carry up all the contracts alike, and it would make no difference if the condition was not inserted, as the note or contract would be void if the road was not built to Rocky Mount by its maturity. Upon this condition, and these representations, defendants said that they would take the stock and give their notes; and Kirkpatrick thereupon filled out the notes, and defendants signed them without reading or hearing them over.

Without the statement and representations that the road would be built to Rocky Mount by the maturity of the note, or it would be void, and that the road would be built to Rutledge, or within three miles of Rutledge, within eighteen months, or two years at furthest, defendants would not have signed or given said note." The plaintiff objected to the admission of the statement shown by the words italicized, and excepted to the overruling of their objection.

"The defendants were allowed to prove, also, by several witnesses, against the objection and exception of the plaintiff, that they were, each of them, subscribers to the capital stock of said plaintiff corporation, and made their subscriptions to said M. L. Kirkpatrick, as plaintiff's agent, a short time before the date of said note sued on; and that said Kirkpatrick represented and stated to each of them that said road would be built to Rutledge, or within three miles of Rutledge, within eighteen months, or two years at furthest, from the giving of their several notes, and that the money paid by them would be refunded, if it was not so built." To the admission of this evidence an exception was duly reserved by the plaintiff.

"Said Kirkpatrick testified for plaintiff, in rebuttal, substantial-

ly, that he was plaintiff's agent in soliciting subscriptions to its capital stock; that he at no time represented, as a fact, that the road would be built to any particular point, or upon any particular line; that he did not represent to the defendants that it would be built to Rocky Mount, but did express to them his opinion that it would be built to Rutledge at some time, but did not say any particular time, and did not tell them that he would defend them against said note if not so built; also, that at the time he took defendants' said note, or obligation, he had authority from the company to state that, if said road was not built to Rutledge, the money would be refunded to the people of Crenshaw county. He further testified, also, that the road was built only to 'Bell's Store' in Montgomery, about eleven miles from Rocky Mount; that it had not been located at all beyond said store, and the money had all given out; that plaintiff had ceased to work on the road in June, or July, 1882, and there was no prospect of the road going beyond said store; that the subscriptions in Crenshaw county amounted to about \$18,000, and, if all collected, would not extend the road three miles."

The court charged the jury, at the request of defendants—

1. "If the jury believe, from the evidence, that Kirkpatrick, as plaintiff's agent, stated and represented to the defendants as a fact, before the making of the note sued on, that the road would be built to Rutledge, or within three miles of Rutledge, within eighteen months, or two years at furthest from the making of said note; and that the road has not been built to Rutledge, nor within three miles of Rutledge, within the time stated, but has only been built to 'Bell's Store' in Montgomery county, about twenty-five miles from Rutledge; and that plaintiff has done nothing whatever since June, or July, 1882, to extend or build said road further; and that without this representation so made, defendants would not have given or executed the note sued on,—then the jury may find for the defendants."

2. "If the jury believe, from the evidence, that Kirkpatrick, as plaintiff's agent, represented to defendants as a fact, at the time the note sued on was given, that the railroad would be built to Rocky Mount by or before the maturity of the note; and that said note was given upon the condition that it was not to be paid, and would be void, unless the road was built to Rocky Mount by the maturity of said note on December 1st, 1882; and that said road has never been built to Rocky Mount, and plaintiff has done nothing since June, or July, 1882, and is doing nothing to build said road beyond 'Bell's Store,' eleven or twelve miles from Rocky Mount towards Montgomery; and further, that these representations were false, and that the defendants, without these representations and conditions, would not have given the note sued on,—then they should find for the defendants."

3. "No one can hold an interest procured for him by the fraud of another, any more than if the fraud was committed by himself. And if the jury believe, from the evidence, that Kirkpatrick, at the time he solicited and took the note sued on, was plaintiff's agent for that purpose, and was sent out by plaintiff to solicit subscriptions for stock and take notes therefor, without any limitations as to his authority or power to make representations such as are set out in the pleadings in this case; and that he did make the representations charged as true and facts, and they were false and fraudulent, and induced defendants to make and give the contract now sued on; and plaintiff is here seeking to enforce the contract thus procured by the false and fraudulent representations of plaintiff's said agent, if they so believe, the consequences of such false and fraudulent representations cannot be avoided by plaintiff, when they are set up to [defeat] the contract sued on."

The plaintiff excepted to these and other charges given by the court, and requested the following charges in writing: (1) "If the jury believe, from the evidence, that said Kirkpatrick made representations of facts to the defendants, which induced them to subscribe to the capital stock of said railroad company, and the facts as represented were of matters which were as open to the inquiry of the defendants as of said Kirkpatrick; then the defendants cannot avail themselves of the representations so made, as a defence to this suit." (2) "If the jury find, from the evidence, that Kirkpatrick made representations of facts as are set out in the defendants' pleas in this case, which were an inducement to them to sign the note sued on; then it was the duty of the defendants to exercise reasonable diligence to ascertain their truth or falsity, and if they failed to do so, they cannot set up the falsity of such representations in bar of the plaintiff's action." The court refused each of these charges, and the plaintiff excepted to their refusal.

The several rulings of the court on the pleadings and evidence, the charges given, and the refusal of the charges asked, are now assigned as error.

Jno. D. Gardner (and with him *Sayre & Graves*) for the appellant.

John Gamble, contra.

STONE, C.J.—In *Rives v. Montgomery South Plank-Road Co.*, 30 Ala. 92, the suit was on a subscription to the capital stock of the plank-road company. The defence was fraud in procuring the subscription. On the trial, "the defendant offered to prove that, before he subscribed for any stock in said company, and before its organization under its charter, two of its subscribers for stock, one of whom was afterwards elected president, and the other secretary of the corporation, represented to him that the road would be so located as to pass through

FRAUD IN PRO-
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his plantation, thereby greatly enhancing the value of his lands; that these representations were repeated by them after their election to their respective offices; and thereupon defendant subscribed for five shares of the capital stock of said company; and that said road, as afterwards located, did not pass within five miles of defendant's plantation." This testimony was rejected by the court, on plaintiff's motion; and the propriety of that ruling was the sole question presented in this court. In passing on that question, the majority of this court said: "We cannot doubt that the declarations of those officers, as offered by the defendant, were relevant and admissible. Those declarations certainly throw some light upon one of the material questions in the case; and to exclude them is to deny, practically, to the defendant the right to prove the very basis on which he rests his defence. Until these declarations are proved, it is impossible to show that they were false, or that they formed an inducement to the defendant to subscribe." It will be observed that, in the case above, we did not decide that the representation, even if not kept and conformed to as a promise, was in itself sufficient to avoid the subscription. That question was not before us. We simply held that it was legal evidence—a predicate for further testimony.

An opinion expressed, even if not realized, cannot, without more, become a fraudulent representation. 2 Brick. Dig. 14, §§ 16, 21; *Lake v. Security Loan Assoc.*, 72 Ala. 207. If, however, such opinion is falsely expressed, with intent to deceive, and does deceive, this constitutes such opinion or representation a false statement of fact, and vitiates a contract thereby procured, unless the representation relates to a matter equally open to both parties. This could not deceive.

In *Pierce on Railroads*, 61, it is said: "This defence [fraud in procuring a subscription] is usually founded in statements known to be false by its official managers, and made by them, or by agents in their behalf, concerning the financial condition and earnings of the company, the amount subscribed, or other material facts calculated to tempt subscribers. They may be made by officers and agents directly to subscribers, or through a prospectus issued by the company to the public, for the purpose of obtaining subscriptions. . . . Equity will set aside a subscription when procured by fraud." And on page 62 it is said: "The subscriber cannot defend on the ground of fraud, . . . where it declared only opinions instead of facts, or where it declared facts of which the subscriber had means of knowledge." The same doctrine is expressed in *Morawetz on Corp.* § 309, and in 1 *Redf. on Railways*, 5th ed. 172-3. See, also, 14 *Amer. Law Review*, 192-3; *Franklin Glass Co. v. Alexander*, 9 *Amer. Dec.* 92, note, 102; *Miss., Onachita & Red River R. Co. v. Cross*, 20 *Ark.* 443; *Evansville, Ind. & Cl. S. L. R. Co. v. Posey*, 12 *Ind.* 363; *Smith v. R. River Co.*, 2 *L.*

R. Eq. Cas. 262; *Water Valley Man. Co. v. Seaman*, 53 Miss. 665; *Hanover Junction R. Co. v. Haldman*, 82 Penn. St. 36; *Crump v. U. S. Min. Co.*, 7 Grat. 352.

In Pennsylvania, the rule that parol testimony cannot be received to vary the terms of a written contract does not prevail; and, hence, in that State the rulings are somewhat different. *Caley v. Phil. & Chester Co. R. Co.*, 80 Penn. St. 363; *Kostenbader v. Peters*, Ib. 438; *Lippincott v. Whitman*, 83 Penn. St. 244. That rule does not prevail with us. *Henderson v. Railroad Co.*, 17 Tex. 560, is, perhaps, the strongest authority that can be found in favor of appellee's views. We are not inclined to go so far.

There can be no question, that if the stock subscription in this case was procured by the fraud of Kirkpatrick, the soliciting agent, the railroad corporation, claiming the benefit of the subscription, must take it tainted with Kirkpatrick's fraud. *Story on Agency*, § 253; *Corning v. Southland*, 3 Hill (N. Y.), 552; *Mead v. Bunn*, 32 N. Y. 275; *Harris v. Delamar*, 3 Ired. Eq. 219; *Meadows v. Smith*, 7 Ired. Eq. 7.

There are cases of fraud, and other unlawful acts, particularly when acts of the same general character are continuous in their nature, where it is permissible to prove other similar transactions occurring about the same time, as shedding some light on the transaction in controversy. *Bigelow on Fraud*, 478; *Benham v. Cary*, 11 Wend. 83; *Aldrich v. Warren*, 16 Me. 465; *Lovell v. Briggs*, 2 N. H. 218; *Whittier v. Varney*, 10 N. H. 291; *Blodgett v. Morrill*, 20 Verm. 509. The present case does not fall within this rule.

There is another class of cases, where a statement is made as of fact, and, relying on its truth, a purchase is made on the strength of it, but it turns out to be untrue. Now, if the erroneous statement was as to a matter of substance, and operated as an inducement to the purchase, then it furnishes ground for defending against the purchase, even though the seller honestly believed the facts existed as he represented them to be. This principle rests, not on the doctrine of fraud, but on the ground that the purchaser failed to get what he bargained for, and failed because of the erroneous statement of fact made by the vendor, which he trusted, and had a right to trust. *Munroe v. Pritchett*, 16 Ala. 785, and, to some extent, *Atwood v. Wright*, 29 Ala. 346, illustrate this principle. It cannot apply, however, where the representation consists in opinion. That, to be the basis of a legal right, in any case, must be knowingly false, and uttered with intent to deceive. A positive statement, made in the sale of a tract of land, that the line runs at a designated place, if acted on, and turns out to be untrue, misleads the purchaser. If the lands obtained are less valuable than the lands pointed out, he is deceived, and consequently is armed with an appropriate remedy to secure his indemnification.

If, however, the representation be made as matter of opinion only, then, to obtain any relief, the purchaser must show that the representation was made knowing its falsehood. Less than an intentional deception, in such conditions, gives no right of action.

One of the grounds of demurrer to all the special pleas is, "that the representations set up as a bar to plaintiff's right to recover were mere matters of opinion of said agent." REPRESENTATIONS MATTERS OF OPINION. There are many other grounds, questioning the sufficiency of the pleas in almost every particular. The representations set forth in each of the special pleas relate to matters afterwards to be performed, and could be nothing but opinion. These pleas are fatally bad, because they do not aver that Kirkpatrick did not honestly entertain the opinions he expressed, and the proof on this question is no better than the pleading. The demurrers to the special pleas ought to have been sustained.

Under the principles declared above, many rulings of the court in admitting testimony, and in charges given, were erroneous. We will not particularize, believing, as we do, that what is stated above will furnish a sufficient guide on another trial.

There is a possible phase of this case not covered by what is said above, nor sufficiently averred in the pleadings. Kirkpatrick testified that he was authorized by the directors to agree with the subscribers to stock living in Crenshaw county, that their money should be refunded to them if the railroad was not built to a point at or near Rutledge. He did not in terms say he gave CONDITIONAL SUBSCRIPTIONS. such promise. He also testified that the money was exhausted, and work on the road had progressed only to "Bell's Store," and had long been discontinued. The record fails to show what is the present *status* of the corporation, whether or not it is insolvent or in active existence, and whether or not it has the means of carrying the road to Rutledge. If the corporation is bankrupt, or has no means of ever constructing the road to Rutledge, it would seem to be a bootless performance, to force the Crenshaw stockholders to pay their subscriptions, to be immediately refunded to them; and if the corporation be insolvent, without power or purpose to complete the road to Rutledge, perhaps it may be defeated and restrained in its attempt to coerce collections, at an expense that might be appalling. We merely throw out these suggestions in the interest of justice and economy. The law takes no pleasure in useless litigation.

Reversed and remanded.

Subscription to Stock secured by False Representations.—See *Braddock v. Phila., etc., R. Co.*, 16 Am. & Eng. R. R. Cas. 486; *Pine Smith v. P. F. R. Co.*, 1 Ib. 874.

Expressions as to Matters of Opinion do not constitute Fraudulent Representations.—It is *held* that representations made by an agent of a railroad company, in reference to the value of a donation of land made by Con-

gress to the company, and in relation to the amount of assets of the company, and its liability to complete the road within a specified time, and the probable cost and profits of the road, though false and exaggerated and intended by him to induce persons to subscribe for stock of the company, are but mere expressions of opinion in reference to matters open to the investigation of both parties; and a person subscribing for stock in the company has no right to rely upon them; and if he does so, and thereby is induced to invest his means in an unprofitable enterprise, it will be no ground of avoiding the contract of subscription. *Walker v. Mobile & Ohio R. Co.*, 34 Miss. 245.

A representation by a bank officer that stock of his bank is worth \$100 per share is a mere expression of opinion or commendation of the stock, and if it turns out to be false a note taken by him for the price of the stock will not thereby be avoided though it was relied on by the purchaser; but it is otherwise with a representation that the bank is in a solvent condition and doing a good business. *Union National Bank v. Hunt*, 76 Mo. 439.

The agents of a railroad company represented that the company had already sufficient stock subscribed to complete their road within eighteen months, and only desired subscriptions from the defendant, and others along the line of the road, as an evidence of their friendly disposition to the road. Defendant, relying on the truth of such representations, and believing the same to be true, and that the road would be completed, and the value of his land be thereby largely increased, made his subscription. In fact, the company had not sufficient means to procure and clear the track for said road, and the road had been abandoned. *Held*, that the facts were not sufficient to release the defendant from liability on his subscription, the alleged misrepresentations being of matters of opinion and expectation, and not of any existing fact. *Bush v. Bradford*, 17 Ind. 490.

The fact that the stock solicitor of a railroad company fraudulently represents that a sufficient amount of solvent stock was subscribed to complete the road within two years, and that the company is able and will press said road to completion within that time, constitutes no bar to a recovery on a subscription on the failure of the road to do so. Such statements being mere expressions of opinion. *Brownlee v. Ohio, etc., R. Co.*, 18 Ind. 68; *Hardy v. Meriweather*, 14 Ind. 208.

ALLEN, Ex'r,

v.

TEXAS AND PACIFIC R. CO.

(*Advance Case, U. S. C. C. E. D. Louisiana. November 18, 1885.*)

Corporations deriving their corporate powers from acts of Congress are entitled to have all suits brought against them in State courts removed to the circuit courts of the United States, on the ground that they are suits arising under the laws of the United States. *Pacific R. Removal Cases*, 115 U. S. 11.

By the consolidation of a federal with a State corporation, the former does not lose any of its rights or franchises as such, and is not estopped from removing suits brought against it in the State courts to those of the United States, notwithstanding that the laws of the State in question provided: "If any railroad company, organized under the laws of this State, shall consolidate by sale or otherwise with any railroad company organized

under the laws of any other State or of the United States, the same shall not thereby become a foreign corporation, but the courts of this State shall retain jurisdiction in all matters which may arise as if said consolidation had not taken place."

ON motion to remand.

Edward D. White and *Eugene D. Saunders* for plaintiff.

John H. Kennard, *W. W. Howe*, and *S. S. Prentiss* for defendant.

PARDEE, J.—In the Pacific R. Removal Cases, 115 U. S. 2, it is expressly decided that the Texas & Pacific R. Co. is a corporation deriving its corporate powers from acts of Congress, and is entitled to have all suits brought against it in State courts removed to circuit courts of the United States, on the ground that they are suits arising under the laws of the United States. It is conceded that this decision controls the present case, and defeats the motion to remand, unless by the acquisition of and consolidation with the New Orleans Pacific R. Co. in June, 1881, by necessary operation of the constitution and laws of Louisiana then in force, the Texas & Pacific R. Co. became a Louisiana corporation, and as such corporation is estopped from removing suits against it from the courts of Louisiana to the United States circuit courts.

The several acts of Congress incorporating the Texas & Pacific R. Co., and conferring various powers upon it, authorized it to extend its line of railroad eastward through Louisiana, and to unite with, acquire, and consolidate with other railroad companies. With these powers it came into Louisiana and acquired and consolidated with the New Orleans Pacific R. Co., a company organized and incorporated under the laws of Louisiana. At the time of the consolidation the constitution of Louisiana provided as follows:

"Art. 246. If any railroad company organized under the laws of this State shall consolidate by sale or otherwise with any railroad company organized under the laws of any other State, or of the United States, the same shall not thereby become a foreign corporation, but the courts of this State shall retain jurisdiction in all matters which may arise, as if said consolidation had not taken place."

The laws of the State authorizing the consolidation of connecting or intersecting railroad companies have this proviso:

"That an office or officer be maintained and preserved in this State, where and upon whom citations may be served; and provided, further, that when a corporation created by or under any law of this State is consolidated with any corporation created by or under any law of any other State, the consolidated corporation shall, for the purposes of litigation with citizens of this State, have

its domicile within the State of Louisiana, and be subject to the jurisdiction of the courts of this State." See act No. 39, Laws 1877, p. 50.

The effects of these provisions on the consolidated railroad company are (1) that the consolidated corporation shall not by consolidation become a foreign corporation; (2) that the courts of the State shall retain jurisdiction in all matters the same as if there had been no consolidation; (3) that the consolidated company shall maintain an office in the State where citations may be served; (4) that, for purposes of litigation with citizens of the State, the consolidated company shall have its domicile within the State, and be subject to the jurisdiction of the courts of the State.

Now, concede these limitations and provisions to be binding on the Texas & Pacific R. Co., by reason of its consolidation with the New Orleans Pacific R. Co., and it still remains that the corporate powers and franchises of the Texas & Pacific R. Co. in Louisiana are, in part at least, derived from the several acts of Congress originally incorporating the company. The consolidation law of Louisiana, act No. 39, *supra*, expressly provides, in its second section, "that the said corporation which shall be so formed by the consolidation of two or more railroad corporations, as aforesaid, shall have, possess and exercise all the rights, powers, privileges, immunities, and franchises, and be subject to all the duties and obligations (not inconsistent with the provisions of this act) conferred and imposed by law upon such companies so consolidating, or either of them," so that even, by the Louisiana law the Texas & Pacific R. Co., by its consolidation with the New Orleans Pacific R. Co., neither lost nor abdicated any of the rights, powers, privileges, immunities, and franchises (not inconsistent with the Louisiana consolidation act nor the Louisiana constitution) that it derived from the several acts of Congress. If the company still possesses the rights, powers, privileges, immunities, and franchises conferred by Congress,—and I do not see how it can be denied,—then it is still a federal corporation, and suits brought against it, according to the Pacific R. Removal Cases, *supra*, arise under the laws of the United States.

No matter if it is not a foreign corporation in Louisiana, nor if it is subject to the jurisdiction of the Louisiana courts, nor if its domicile is in Louisiana, nor if the spirit and purpose of the Louisiana constitution and laws were to make the consolidated corporation wholly a Louisiana corporation, and thus prevent the removal of suits against it to the circuit courts of the United States, still its rights, powers, privileges, immunities, and franchises must be sought in and be determined by the laws of the United States.

It may be noticed that so far as this record goes the Texas & Pacific, in coming into Louisiana and acquiring the New Orleans Pacific, has acted wholly within its charter and powers as derived

TEXAS AND PAC.
R. CO., POWERS
STILL DERIVED
FROM CONGRESS.

from Congress, and it is not improbable that its acquisition of and consolidation with the New Orleans Pacific may be legal and valid without looking to Louisiana legislation on the subject. And it is proper to say in this opinion that a fair consideration of the constitution and laws of Louisiana bearing on the subject of the consolidation of railroad companies leads to the conclusion that all that the legislator intended by the limitations heretofore quoted was to secure jurisdiction for the State tribunals so far as citizenship and domicile are concerned, and not to deprive either of the consolidating corporations of any of their chartered rights and franchises, which rights and franchises might be the sole consideration, on one side or both, of the consolidation. It certainly cannot be considered that the law of 1877, in providing for the consolidation of a Louisiana railroad company with a connecting company outside of the State, contemplated, much less required, that the franchises of the foreign company should be surrendered or abdicated, for such surrender would defeat the very purpose of the consolidation. That the State of Louisiana intended to make the consolidated company waive any rights it might have to remove cases from the State to the United States courts as a condition of the consolidation, does not appear in the constitution or any law, and is not to be presumed, for such condition would be null and void as violating the constitution of the United States. See *Railway Co. v. Whitton*, 13 Wall. 270; *Insurance Co. v. Morse*, 20 Wall. 445.

CHARTER
POWERS
CONSOLIDATION
VALID BY CON.

The motion to remand is denied.

NATIONAL CORPORATIONS.

BY RUSSELL H. CURTIS, OF THE CHICAGO BAR.

- I. Definition of national corporations—Their importance—Ignorance of them as a class.
- II. Formation of such corporations.
- III. Powers of such corporations.
- IV. Dissolution of such corporations.

National corporations form the subject of this note. The term, national corporation, as used here, means a corporation existing under a franchise conferred by the national government. A corporation existing under a franchise conferred by a State is not within the definition. National corporations may be divided into three classes: 1. Those authorized to act within the States; 2. Those authorized to act within the Territories; 3. Those authorized to act within the District of Columbia. Some corporations fall within all three classes.

Corporations of the first class, of which national banks and the Pacific railway companies are examples, are of general interest both from the legal questions to which they give rise, their wide territorial distribution, their wealth, and the possible consequences of their increase in the future. The capital stock of the more noticeable of them is now worth on the market, in round numbers, \$600,000,000. Yet they have hitherto received from writers on legal topics almost no attention. The standard general text-books on corporations rarely allude to them and never consider them as a class by themselves. So eminent a jurist as Judge Cooley in an article on corporations in

"The Cyclopædia of Political Science" states (vol. i. p. 666) that the power of the general government to create corporations is confined to the Territories and to the District of Columbia.

It is not difficult to enumerate the principal national corporations which have been authorized to act within the States, for such corporations have been important at almost all periods of our history since the formation of the federal government. In 1791 the first Congress which sat under the constitution incorporated the earliest bank of the United States. 1 St. at L. 191. It has sometimes been asserted that Alexander Hamilton, while Secretary of the Treasury, procured the passage of the bank charter by the aid of Southern votes, given in consideration of the acquiescence of the North in the present location of the capital at Washington. In Hodge's "Life of Hamilton," however, the bargain is said to have related to another of Hamilton's pet measures, the assumption by the nation of the debts incurred by the States during the Revolution. The corporate existence of this bank expired, according to the limitation contained in its charter, in 1811. In 1815 a bill to incorporate a national bank was passed by Congress, but was vetoed by President Madison. *Annals of Congress*, 18th Congress, vol. iii. p. 208. In 1816 Congress incorporated the second bank of the United States. 3 St. at L. 266. Its charter expired by its own limitation on March 3, 1836. The famous controversy between President Jackson and the bank over the question of the renewal of its charter culminated three years earlier, when the President secured a Secretary of the Treasury who would obey his order to withdraw from the bank the public funds. *Tyler's Life of Taney*, pp. 205, 206. The opinion held by that Secretary concerning the rights of this national corporation was not, it has been supposed, the least of the causes which led to his appointment to the office of Chief Justice of the United States Supreme Court. In 1841 Congress passed a bill to incorporate a national bank, but it was vetoed by President Tyler. 10 *Congressional Globe*, 337. In 1863 Congress for the first time authorized the formation of national banks by a general statute. 12 St. at L. 665.

In 1862 Congress chartered the Union Pacific R. Co., with power to construct a railway and telegraph line through the national Territories, and by the act of incorporation granted franchises to two railway corporations, chartered by the State of California and the State of Kansas respectively, and provided for operating the lines of the three corporations as one line and for their future consolidation. 12 St. at L. 489. The consolidation provided for by the charter was effected in 1880. *Poor's Manual of Railroads* for 1885. The name of the consolidated corporation is The Union Pacific Railway Company. Whatever may be thought of the status of the constituent corporations from which this consolidated corporation was formed, it appears to be a national corporation authorized to act within the States of the Union. *Pacific Railroad Removal Cases*, 115 U. S. 1. In 1864 Congress chartered the Northern Pacific R. Co., and authorized it to construct a railway and telegraph line from a point in the State of Minnesota or the State of Wisconsin west to Puget's Sound. 18 St. at L. 365. The charter provided that no road should be constructed within a State without the previous consent of the legislature of the State. In 1866 Congress chartered the Atlantic & Pacific R. Co., with authority to construct a railway and telegraph from a point in the State of Missouri to the Pacific Ocean. 14 St. at L. 292. In 1871 Congress chartered the Texas Pacific R. Co. to construct a railway in part in the States of California and Texas. 16 St. at L. 573; supplemental act May 2, 1872, 17 St. at L. 59.

It is a mistake to suppose that Congress has chartered any corporation with power simply to operate telegraph lines within the States. It has by general statute conferred upon such State telegraph companies as choose to accept the terms offered, the franchise to construct and operate their lines on

all post routes, which include all railways, public roads and streets in the country. Consult Act of July 24, 1866, substantially re-enacted as Rev. St. §§ 52, 63-5268; as to penalties, Act of June 10, 1872, 17 St. at L. 366; same, Rev. St. § 5269; as to what are post routes, Act of June 8, 1872, 17 St. at L. 283 at p. 308, § 201; Rev. St. § 3964; Act of March 1, 1884, 23 St. at L. 8; Pensacola Tel. Co. v. W. U. Tel. Co., 96 U. S. 1; Tel. Co. v. Texas, 105 U. S. 460. These State corporations, although they are made federal agents and have important powers confided to them to be exercised in all parts of the Union, are not within the scope of this note.

Organisation.—It will be interesting to examine the question how national corporations may be formed. The power to create a corporation is not given by the people in express terms to Congress or to any officer of the general government. The constitution, the people's sole grant of power to their officers, does not contain any express grant of power to create a corporation. We must look for such power, therefore, as an incident to the powers expressly granted. Whatever we may think as an open question of the power of the general government to create corporations, such power is now established by the decisions of the United States Supreme Court, by the practice of the government and by the cheerful acquiescence of the people. In *McCulloch v. Maryland*, 4 Wheat. 416, affirmed in *Osborn v. U. S. Bk.*, 9 Wheat. 738; *Farmers', etc., Nat. Bank v. Dearing*, 91 U. S. 29; *Legal Tender Case*, 110 U. S. 421, Chief Justice Marshall laid down the rule which has been followed ever since—that Congress has power to create a corporation whenever to do so is an *appropriate*, and not an expressly prohibited, measure to carry into execution the enumerated powers of the national government. It was also decided in that case that the question whether the creation of a corporation in a particular instance is an appropriate means to accomplish the end sought, is one for the courts to decide; that the question whether such measure is expedient is one solely for Congress.

Congress has not indicated under which of its express powers it acted when it passed the several national banking acts and Pacific railway acts. The banking statutes may perhaps fall under the power of Congress to borrow money, to regulate interstate commerce, to coin money and to regulate the value thereof. And the railway statutes may be referred to the power of Congress to establish post roads, to support armies, and to regulate interstate commerce. U. S. Const. art. 1, § 8.

The national corporations, authorized to act within State limits, which have been created to the present time, are banks, railway and telegraph companies.

The general government has created no municipal corporations within the States unless it be by treaty with Indian tribes. Consult the history of the Creek and Cherokee controversy; 1 Von Holst's Const. Hist. of U. S. (Amer. ed.) 433. Under the rule laid down by Marshall and previously stated, the purposes for which national corporations may be created in the future are only limited by the principle that such corporations must be appropriate means to carry into execution the express powers of the national government.

By the Constitution Congress is given power "to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." U. S. Const. art. 4, § 3, cl. 2. Under this clause Congress has exercised undisputed control over the Territories for all purposes. It has empowered the territorial legislatures to authorize by general statute the formation of corporations within their jurisdictions. U. S. Rev. St. (3 ed., 1878) § 1889. Such legislatures are prohibited by Congress to grant private charters or special privileges (U. S. Const. art. 4, § 3, cl. 2), but no such restriction rests upon Congress itself. It has authorized a railway corporation created by one Territory to extend its line through other Ter-

ritories. U. S. Laws 1877-1878, p. 241, ch. 362. Territorial corporations become State corporations upon admission of the Territory creating them into the Union. *Kansas Pacific v. Atkinson R.*, 112 U. S. 414. *Accord*, *Vance v. Farmers', etc., Bank*, 1 Blackf. (Indiana) 80; *Bank of Vincennes v. State of Indiana*, 1 Blackf. 287.

By the Constitution Congress is expressly given power to exercise exclusive jurisdiction over the District of Columbia. U. S. Const. art. 1, § 8, cl. 17. Under the authority conferred by this provision Congress may create corporations within the District. Such power recognized. *Hadley v. Freedmen's Savings, etc., Co.*, 2 Tenn. Chy. 122; *Williams v. Creswell*, 51 Miss. 817. It has frequently done so. In one volume of the statutes at large (19 St. at L.) are to be found an act to incorporate a building company, an act to incorporate a railway company, an act to amend the charter of another railway company, acts to incorporate an inebriate asylum and a cemetery, and an act to incorporate an insurance company.

Powers.—We come now to consider the franchises which Congress may confer on national corporations.

Over the Territories and District of Columbia we have already seen that Congress has general legislative power limited only by the federal constitution. In the exercise of this jurisdiction the franchises which Congress may confer on a corporation, beyond the franchise to exist, are probably co-extensive with those it may confer on a natural person.

The franchises which Congress may confer on national corporations to be exercised within the States of the Union are probably limited by Marshall's rule that such corporations must be appropriate means to carry into execution the express powers of the general government. Subject to such restriction no reason is perceived why Congress may not confer franchises upon such corporations to the same extent as upon natural persons.

Such corporations are exempt from State taxation and control so far as State legislation may impair their efficiency as agencies of the national government. This statement of the law is based on the ruling of the United States Supreme Court in *National Bank v. Commonwealth*, decided in 1869, and the cases following it. 9 Wall. 858, affirmed in *Railroad Co. v. Peniston*, 18 Wall. 5; s. c., 1 Dillon C. C. Rep. 314; *Thompson v. Pacific R.*, 9 Wall. 579. The exemption of national corporations from State taxation is not as broad under this rule as it was under the ruling in *McCulloch v. Maryland*, 4 Wheat. 316, and in *Osborn v. United States Bank*, 9 Wheat. 738, decided when Chief Justice Marshall was on the bench. In those cases such corporations were held to be wholly exempt from State taxation with the exception of taxation of their real estate, and of taxation of stockholders, residing within the taxing State, upon the stock held by them.

In *Railroad Co. v. Peniston*, 18 Wall. 5; s. c., 1 Dillon C. C. Rep. 314 (*Accord*, *Tel. Co. v. Texas*, 105 U. S. 460), the right of a State to tax property within its territory belonging to a railway corporation chartered by Congress was directly in issue, and the court applying the rule just announced—that such corporations are taxable in the States in those cases in which their efficiency as federal agencies is not impaired—arrived at the further rule that the States may tax the property but not the operations of federal agents, and decided that the property in question was subject to State taxation. *Van Allen v. Assessors*, 8 Wall. 578.

Congress may give the States the right to tax national corporations, and may impose conditions upon such grants. U. S. Rev. St. (ed. of 1878) § 5319. It has done so in the case of the national banks.

Aside from the exemption from State taxation which a national corporation may enjoy as an agency of the national government, it, if a party carrying on interstate commerce, may be exempt from State taxation on that

ground also. Interstate commerce conducted by a corporation is entitled to the same protection against State exactions which is given to such commerce conducted by individuals. *Gloucester Ferry Co. v. Penn.*, 114 U. S. 196; *Pensacola Telegraph Co. v. Western Union Telegraph Co.*, 96 U. S. 1.

The national government may exercise the power of eminent domain within the States as well as within the Territories, whenever necessary to carry into execution the powers conferred upon it by the Constitution. The case of *Kohl v. United States*, 91 U. S. 367, has settled the point. Congress has delegated to national corporations the power of eminent domain to be exercised within the Territories. See several Pacific railway acts, cited *supra*. And although the point has not been decided by the courts, it is probable—judging from the settled practice of the States towards corporations created by themselves—that Congress has authority to delegate the power of eminent domain to national corporations to be exercised within the States. In the case of some of the national railway corporations all controversy was avoided by provisions in the statutes creating them forbidding or rendering impossible the construction of roads within the boundaries of a State without its assent. However, in one case at least the assent of the State was obtained after the construction of the road. Recital in *Pacific Railroad Removal Cases*, 115 U. S. 1. The charter of another national railway corporation provides for the condemnation of private property within States according to the law of the State in which the property is situated. 16 St. at L. p. 576, § 10.

Congress has power under the Constitution to give the federal courts jurisdiction of all suits by or against national corporations. *Osborn v. Bank of United States*, 9 Wheat. 738; *accord*, *Kennedy v. Gibson*, 8 Wall. 498; *Pacific Railroad Removal Cases*, 115 U. S. 1. And to make such jurisdiction exclusive. *The Moses Taylor*, 4 Wall. 411; *Gaines v. Fuentes*, 92 U. S. 10; *Claffin v. Houseman, Assignee*, 93 U. S. 130. The creation of a corporation by the general government is held by the United States Supreme Court to make any controversy to which it may be a party a controversy arising under the laws of the United States, and hence under the Constitution, art. 3, § 2, a controversy to which the judicial power of the United States extends, irrespective of the citizenship of the parties. *Osborn v. Bank of U. S.*, *supra*; *Pacific Railroad Removal Cases*, *supra*. It was decided as early as 1824 that Congress has power to authorize national corporations to sue and be sued in the federal courts. *Osborn v. Bank of U. S.*, *supra*. And in 1885 it was further decided that Congress has power to authorize national corporations to remove to federal courts suits brought against them in State courts. *Pacific Railroad Removal Cases*, *supra*.

An injunction lies to protect a national corporation in the enjoyment of its franchises; *e.g.*, an injunction lies against an agent of a State threatening to destroy the exercise of such franchises by the execution of void State laws. *Osborn v. Bank of U. S.*, *supra*. The validity of the organization of a *de-facto* national corporation will be inquired into only in a direct proceeding for that purpose. *Pacific Railroad Removal Cases*, *supra*.

We come now to the consideration of the question how national corporations may be dissolved. To the present time, the only mode in which such corporations have ceased to exist is by the expiration of the terms of their charters, as was the case with the first and second United States Bank. The reorganization of such a corporation by consolidation of it with others to form a new national corporation, *e.g.*, the merging of the Union Pacific Railroad Co. in the Union Pacific Railway Co., is not a dissolution of it, but a change in its organization. A national corporation may probably be dissolved, like other corporations, by an accepted surrender of its franchise to exist, by a judicial forfeiture of such franchise for non-user or misuser of

it, or by the appropriation of such franchise by the government under its power of eminent domain.

There remains the question, Is a franchise to be a corporation conferred by one Congress irrevocable by future Congresses? The question has never been directly raised before the United States Supreme Court. Morawetz in his work on corporations (1st ed., § 629) mentions as one mode in which a corporation may be dissolved—"By legislative enactment if no constitutional provision be violated." And this is undoubtedly good law, as by our case law the legislature is omnipotent in the absence of constitutional limitations upon its power. The grant of a franchise to be a corporation is a contract between the grantor and the grantee. *Dartmouth College v. Woodward*, 4 Wheat. 518. There is no constitutional provision limiting the power of one Congress to annul the acts of its predecessors, unless it be an implied prohibition against the violation of contracts. The express prohibition against the violation of the obligation of contracts contained in the constitution (U. S. Const. art. 1, § 10, cl. 1) does not affect the question under discussion, as such provision is a limitation only upon the powers of the several States. See authorities collected in *Desty's Fed. Const.* at p. 125. Without attempting to answer the question whether the Constitution contains any such implied prohibition, it is proposed to mention some evidence bearing upon its solution.

The Legal Tender Cases tend to prove that Congress may impair the obligation of contracts between citizens.

Contra.—The opinion of several Congresses upon their own powers may be gathered from charters which they have conferred on national corporations.

Section 12 of the charter of the first United States Bank was as follows: "That no other bank shall be established by any future law of the United States during the continuance of the corporation hereby created; for which the faith of the United States is hereby pledged." 1 St. at L. 191.

In the charter of the second United States Bank (8 St. at L. 266) this section is repeated, with the limitation that Congress may establish banks in the District of Columbia. The charter of the second bank also contained the following clause: That "in consideration of the exclusive privileges and benefits conferred by this act upon the said bank," the directors shall pay to the United States \$1,500,000. Section 23 of the charter conferred power on the United States Circuit Court for Pennsylvania to declare a forfeiture of the corporate franchise upon proof of misuser, in a suit which should be ordered by the President or Congress.

These clauses indicate quite clearly that the Congress of 1791 and that of 1816 believed that they could legally bind their successors by the grant of special privileges. The same opinion is indicated in the charters of the Pacific railway companies, and in the later banking acts, all of which contain a reservation by Congress of the right to amend them.

The United States Supreme Court has held that the federal government occupies towards the Union Pacific R. Co. the twofold relation of sovereign and creditor; that a suit ordered by Congress to be brought by the Attorney-General against the corporation; to recover misapplied corporate funds is a suit founded on a contract; and that in its capacity of creditor the government can recover only upon such facts as would entitle any other creditor to recover. *United States v. Union Pacific R. Co.*, 98 U. S. 569.

KELLEY

v.

NEWBURYPORT AND AMESBURY HORSE R. CO.

(Advance Case, Massachusetts. May 6, 1886.)

The filing of a certificate of incorporation by a horse railroad company, reciting that fifty per cent of the capital stock had been paid in, as required by the statute, when in fact it had not and was not until some time thereafter, does not render a contract for building the road and the obligations incurred for that purpose absolutely void. Such contracts and obligations may be ratified by the subsequent action of the stockholders.

Defendants' counsel requested the court to rule that there could be no ratification by the stockholders except by some independent, substantive act, with full knowledge of all the facts and their legal effect. The request was denied. *Held*, no error; that it is sufficient in such a case if the ratification is made with a full knowledge of all the material facts.

As a general rule a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation. Such a contract does not necessarily require any independent and substantive act of ratification, but it may become finally established as a valid contract by acquiescence.

CONTRACT to recover upon certain promissory notes alleged to have been made by the defendant corporation payable to the order of E. G. Kelley and William C. Binney. The several notes were in the same form, and were as follows:

"\$1000 NEWBURYPORT, *May 20, 1875.*

"For value received the Newburyport and Amesbury Horse Railroad Company promise to pay to the order of E. G. Kelley and William C. Binney one thousand dollars in four years, or nine years from this date, at the option of said company, with interest at the rate of seven per cent per annum, payable semi-annually.

"This note is authorized by a vote of the directors of said company at a meeting held May 8, 1875.

"WM. C. BINNEY, *Treasurer.*

"Witnessed and approved by

"JOS. B. MORRIS, *Chairman of Committee.*"

There were indorsements of interest paid semi-annually from November 20, 1875, to May 20, 1883, inclusive; also the following indorsements:

"Pay to E. G. Kelley, or order, without recourse to me.

"WM. C. BINNEY."

"Pay to Emily K. Rand or order.

"E. G. KELLEY.

"By EDWARD M. RAND, his *Attorney.*"

"Pay to Mary H. Kelley or order.

"EMILY K. RAND."

The case was referred to an auditor. From the auditor's report, which was made a part of the bill of exceptions, it appears that the defendant corporation was organized under a special charter and its first board of nine directors was chosen August 29, 1871, and on the 4th day of September, 1871, Elbridge G. Kelley was chosen its president and Amos Coffin its treasurer. Coffin subsequently resigned the office, and on May 7, 1872, William C. Binney was elected treasurer. The capital stock of the company was fixed at \$60,000. On the 7th of August, 1872, a certificate was prepared, signed and sworn to by the president, treasurer, clerk and a majority of the directors, in which it was stated that the amount of the capital stock of the company had been unconditionally subscribed for by responsible parties, and that fifty per cent of the par value of each share thereof had been actually paid in cash, and this certificate was filed in the office of the secretary of the commonwealth on the 8th of August, 1872. Immediately succeeding the filing of this certificate, the directors concluded a contract for the construction of the road with Col. John E. Gowen, who gave bond to the company for the faithful performance of the contract with Elbridge G. Kelley and William C. Binney, as sureties.

On the 24th of March, 1873, the directors caused notice to be given to the said contractor that, unless he commenced in five days from the date of the notice to finish the construction of the road in Salisbury, Amesbury, and Newburyport, which he had contracted to build, and prosecuted the work with diligence and vigor, the company would notify his sureties to proceed to finish the construction of the road, and in case of default the company would proceed to finish it and hold him and his sureties answerable and liable for all further damages which might accrue to the company by his default. The contractor having failed to proceed with the work, on the 31st of March, 1873, the directors caused notice to be given to the sureties that, unless they proceeded in twenty-four hours from the receipt of the notice to them to finish the road, the company would finish it and hold them and the contractor liable for all damages which might accrue to the company by their default. Soon after the receipt of this notice the sureties proceeded to finish the road, and prosecuted the work until it was completed as required by the contract.

On the 8th day of May, 1875, at a meeting of the directors, at which all were present except Kelley, it was voted that the indebtedness of the company be settled by giving the notes of the company, payable in four or nine years, at the option of the company, with interest at the rate of seven per cent per annum, payable semi-annually, provided all the outstanding liabilities of the company and all claims against the company could be adjusted and settled for \$24,000, and a surrender and return to the company of two hundred shares of the stock issued to John E. Gowen, the con-

tractor, and the directors appointed certain of their number a committee to carry out the provisions of this vote. The settlements were made with the various persons holding claims, the capital stock that had been issued to Gowen was surrendered and returned to the company, and notes of the company to the amount of \$24,000 were issued in accordance with the vote of the directors. The notes sued upon were given in payment for advancements made by Kelley and Binney for the completion of the road, and were a part of the notes issued by the defendant corporation in payment of its indebtedness for the construction of the road.

Other material facts found by the auditor appear in the opinion.

At the trial in the superior court the plaintiff did not contend that she gave any valuable consideration to E. G. Kelley, from whom she and the other children of Kelley had received the notes, as gifts, nor did she claim any better right to recover thereon than E. G. Kelley would have had, had the notes been ratified while in his hands. The plaintiff contended they had been ratified since he parted with them; nor did defendant contend that, if E. G. Kelley could recover upon the notes, the plaintiff could not do so, but contended and asked the court to rule upon all the evidence that the notes were fraudulently and illegally issued and were void and incapable of ratification. The court ruled in substance that the notes were originally void in the hands of Binney and Kelley, who could not maintain an action upon them against the defendant, but that the notes might be ratified by the stockholders of the defendant corporation, and that it was for the jury to determine whether they had been so ratified.

The case was submitted to the jury upon this question. Upon this point the following testimony was given:

B. F. Atkinson testified that he was mayor of Newburyport, in 1875; that the city of Newburyport owned stock of the defendant corporation to the amount of \$25,000 in value at par; that he was a director in the company by virtue of his office as mayor; that he was present at the meeting of the directors of May 8, 1875, but he knew nothing about the circumstances under which the debt for which the notes were given was incurred, but a few days before the notes were issued he heard rumors that Kelley and Binney were endeavoring to make the company assume a debt which they ought not to pay; that he consulted counsel in reference to enjoining the directors from issuing the notes; that he understood that a bill for an injunction was drawn, and that it was reported to him that the court, without going into the merits of the case, expressed an opinion that a stockholder could not prevent the directors from discharging any obligation, either in cash or the notes of the company, and that notwithstanding they had previously contracted to pay the debt in shares of its capital stock; that he never had any

further knowledge of the matter, and that it was not brought to the attention of the city government.

Other witnesses, including all persons who had held the office of mayor of Newburyport from 1875 to 1884, testified that they had no knowledge of circumstances under which the notes were given, and that no communication relating to them was made to the city government and no action taken by the city government in reference thereto.

Certain other evidence from the books of the corporation was offered. Among other evidence was the acceptance by the stockholders of the fourth annual report of the treasurer, October 6, 1875, acknowledging the receipt of certain amounts by Kelley and Binney on the notes of the company dated May 20, 1875, being in part the notes in suit, and recognizing the liability of the company thereon; also the acceptance of the treasurer's report, dated October 2, 1878, in which it was stated that after the completion of the road there were due certain amounts to Kelley and Binney for money advanced from time to time, and that the company settled these demands by giving its notes at seven per cent interest, payable in nine years from date. There was also the record of the acceptance by the corporation of the statute of 1884, chapter 149, of the acts of the legislature of Massachusetts, authorizing the company to issue mortgage bonds for the payment of its indebtedness.

It was also in evidence that the whole amount of the stock of the company, outstanding, besides that owned by the city of Newburyport, after the stock found by the auditor to have issued to Gowen had been surrendered, was of the value at par of \$12,500. The board of directors consisted of nine persons, and of these, five individuals, who were directors in 1875, continued to be directors until October, 1882, and four continued directors until October, 1883, and so long as the interest on said notes were paid. Upon this evidence the defendant requested the court to rule:

1. There could be no ratification of the acts of the directors in making and issuing the notes declared upon while Kelley and Binney remained influential members of the board of directors, nor while a majority of the directors were persons who were on said board in 1875 when the vote authorizing the issue of the notes was passed and the notes given.

2. There can be no ratification of these contracts, either by a succeeding board of directors or by the stockholders, unless they were fully aware of every material circumstance attending the making of the contract, and unless they knew also the legal effect of the facts attending the issuing of these notes, and then with a knowledge both of the law and the facts ratified the contracts by some independent and substantive act; and the burden is on the plaintiff to prove such knowledge.

3. Nothing done by the directors can give legality as against the stockholders to their illegal acts in issuing the notes, upon which this suit is brought.

4. There is no evidence upon which a jury can find that the defendant has ratified the contracts declared on.

5. Upon all the evidence the plaintiff is not entitled to recover.

The court refused to give the rulings requested, and instructed the jury that, if the acts proved and relied upon by the plaintiff to prove ratification were done with a knowledge on the part of the stockholders of the facts relating to the issuing of the notes, the jury may find a ratification of the notes on the part of the stockholders," and gave other instructions, to which no exception was taken, except that he did not instruct the jury that in order to constitute a ratification the stockholders must know the legal effect of the facts and circumstances attending the issuing of the notes.

The jury found for the plaintiff for the amount of the notes and interest, and the defendant alleged exceptions.

R. D. Smith and *M. M. Weston* for plaintiff.

H. N. Shepard and *H. P. Moulton* for defendant.

C. ALLEN, J.—The first ground of defence is, that by virtue of Stat. 1871, chap. 381, § 6, the defendant was forbidden to build its road until a certificate had been filed in the office of the secretary of the commonwealth, signed and sworn to by the president, treasurer, clerk and a majority of the directors, stating FILING OF FALSE CERTIFICATE. that the whole amount of the capital stock had been unconditionally subscribed for by responsible parties, and that fifty per cent of the par value of each share of the same had been actually paid into its treasury in cash. It appeared by the auditor's report that such a certificate was filed in season, but he received evidence to show, and found as a fact, that fifty per cent of the par value of each share had not been paid in, though the whole of the capital stock had been duly subscribed for, and more than fifty per cent of the whole amount of it had been paid in at the time of the making of the contract for the construction of the road. Under these circumstances, the defendant contends that it had no power to enter into a contract for the construction of its road; that the act was *ultra vires*; that the unanimous action of the stockholders would not cure the taint, and that all promises for work and materials in building the road and all notes given therefor are void and incapable of ratification, and that it cannot now be held responsible therefor, although for nearly ten years it has held, enjoyed, operated and taken the earnings of the road so built for it, and paid the interest on the notes.

In reference to this ground of defence it is sufficient to say that,

according to cases heretofore decided, it has been declared to be unavailable. It was not intended by the legislature to allow corporations to escape from their just debts in this manner. First National Bank of Salem v. Almy, 117 Mass. 476; Augur Steel Axle Co. v. Whittier, Id. 451; Whitney v. Wyman, 101 U. S. 392. See, also, Davis v. Old Colony R., 181 Mass. 260; s. c., 3 Am. & Eng. R. R. Cas. 443; Monument National Bank v. Globe Works, 101 Mass. 57; Gold Mining Company v. National Bank, 96 U. S. 640; Harris v. Rannels, 12 How. 79; O'Hare v. Second Nat. Bank, 77 Penn. St. 96.

The defendant then contends that the notes in suit cannot be enforced, because they were given to its own directors, in payment for the construction of the road by them, and are now held by the plaintiff, subject to all defences which might have been made to a suit upon them by the payees. Upon this point the only question properly before us is, whether there was sufficient evidence to warrant the jury in finding a ratification of the notes by the corporation. The presiding judge assumed that the notes were originally void, and submitted to the jury the single question of ratification. Being of the opinion that there was sufficient evidence to warrant the verdict on the question of ratification, we have no occasion to consider whether it might not also have been proper to submit to the jury the question of the original validity of the notes under proper instructions. The first request for instructions was properly refused. It seems to refer to a supposed theory of the plaintiffs that the notes might be ratified by the directors, whereas the sole question submitted to the jury was, whether they had been ratified by the stockholders, *i. e.*, by the corporation itself.

The third request is open to the same objection. The second request sought to incorporate into the doctrine of ratification a new element, namely, that in order to make a valid ratification the principal must have not only known all the facts, but also the legal effect of the facts, and then with a knowledge both of the law and the facts have ratified the contract by some independent and substantive act. This request also was properly refused. It is sufficient if a ratification is made with a full knowledge of all the material facts. Indeed, a rule somewhat less stringent than this may properly be laid down, where one purposely shuts his eyes to means of information within his own possession and control, and ratifies an act deliberately, having all the knowledge in respect to it which he cares to have. Combs v. Scott, 12 Allen, 493, 497; Phosphate of Lime Co. v. Green, L. R., 7 C. P. 43, 57 (1 Eng. Rep. 98).

The fourth and fifth requests were both to the effect that on all the evidence the jury would not be warranted in finding a ratifica-

NOTES GIVEN TO
DIRECTOR—RATI-
FICATION.

RATIFICATION
SUFFICIENT.

tion. The circumstances of the case were such as to render the inference of ratification natural and easy, especially in view of the lapse of time since the notes were given. EVIDENCE WARRANTED FINDING OF RATIFICATION. There was uncontradicted evidence tending to show that the directors made a contract with one Gowen for building the road for a certain price in money and stock, and that he gave to the company a bond, with Kelley and Binney as sureties, for the faithful performance of his contract; Gowen failing to perform his contract, the board of directors called on the sureties, who themselves were directors, to perform it, with notice that they would be held liable to the company for all damages that might accrue to the company by their default. Thereupon the sureties proceeded to finish the road according to the contract, in which originally they had no interest. The price was fair and reasonable; the road as completed by them was a well-built road; the advancements made by them were in consequence of the notice given to them by the directors, and not with any fraudulent design to obtain any pecuniary benefit for themselves from said contract. The settlement was made with them by the directors, under authority of a general vote of the stockholders, authorizing them to make any settlement, and the notes in suit were given. As a general rule, a contract between a corporation and its directors is not absolutely void, but voidable at the election of the corporation. Such a contract does not necessarily require any independent and substantive act of ratification, but it may become finally established as a valid contract by acquiescence. The right to avoid it may be waived. *Union Pacific R. Co. v. Credit Mobilier*, 135 Mass. 376, 377; s. c., 16 Am. & Eng. R. R. Cas. 570; *Twin Lick Oil Co. v. Marbury*, 91 U. S. 587; *Hotel Co. v. Wade*, 97 Id. 13; *Ashhurst's Appeal*, 60 Penn. St. 290. In the present case such ratification or waiver might well be inferred, and indeed we do not see how any other inference could fairly be drawn from the act of the company in holding and operating the road for so many years without taking any steps to repudiate the notes, from the payment of interest, from the acceptance of the report of the treasurer on October 6, 1875, and October 2, 1878, and from the acceptance of the statute of 1884—chap. 149—authorizing the company to issue bonds to an amount not exceeding \$30,000, for the purpose of extinguishing its floating debt.

Exceptions overruled.

Corporations—Promissory Notes—Issued by Directors of Corporation—Ratification of Use of Seal by Treasurer—Slight Evidence of, sufficient.—Certain promissory notes were issued by the treasurer of a corporation, with the seal of the corporation added, in settlement of a contract for building a railroad. It appeared that two of the directors of the company examined the notes after they were issued, and one of them pronounced them genuine, and a part of certain notes issued by vote of the stockholders, and that he, as treasurer of the company, paid interest upon them; that this appeared in

his annual report to the company. The other director also pronounced the notes genuine. In the reports of the treasurer to the stockholders for five years, all of which were accepted by the stockholders, obligations of the company were sometimes spoken of as notes, and sometimes as bonds. *Held*, that it being a matter of excess or misuse of authority in adding seals to notes when the authority was express to the extent of giving notes, slight evidence of the ratification of such excess in respect to the seals was sufficient, and that there was sufficient evidence of a ratification by the directors of the use of seals. *Parish of St. James v. Newburyport & A. R. Co. (Mass. 1886)*, 5 East. Repr. 302.

Liability of Director as Fiduciary.—One agreeing with the directors of a corporation that he would buy, at a heavy discount, its bonds about to be issued on being himself elected a director, is liable to creditors of the corporation for the profits of the transaction. A director is a trustee and cannot speculate in the trust funds. A director against whom judgment has been obtained in such case by one of the creditors may have contribution from his co-directors.

A corporation is still liable for its debts though its property and franchises have been sold. *Widrig & Co. v. Newport Street R. Co., etc. (Kentucky, Jan. 8, 1885)*.

Fiduciary Relation of Directors to Corporation—Purchase of Land.—See *Barnes v. Brown*, 2 Am. & Eng. R. R. Cas. 638; *Sims v. Brooklyn St. R. Co.*, 4 Ib. 182; *Mich. Air Line R. Co. v. Mellon*, 5 Ib. 245; *Little Rock, etc., R. Co. v. Page*, 7 Ib. 36; *Addison et al. v. Lewis*, 9 Ib. 702; *Case v. Kelly*, 13 Ib. 70; *Cook v. Sherman*, 16 Ib. 561.

ATCHISON, TOPEKA AND SANTA FE R. CO. *et al.*

v.

FLETCHER.

(*Advance Case, Kansas. April 9, 1886.*)

A corporation is clothed everywhere with the powers given by its charter, and has the capacity to carry on its business and extend its operations in other States and countries, so long as it does not depart from the terms of the charter under which it was created.

Additional powers, auxiliary to the original design or purpose of a corporation, may be conferred thereon by the legislature of the State where the corporation is created.

Under the provisions of the charter of the Atchison, Topeka & Santa Fe R. Co., of February 11, 1859, and the terms of the statutes of Kansas, if such company guaranties a bond or other negotiable instrument, and takes the same as its own and sells it, its guaranty will be binding upon the company in the hands of an innocent holder for value, and without notice of the origin of its title, even if the guaranty of that particular bond, or other negotiable instrument, when made, was *ultra vires* in that special instance.

Any railway company organized under the laws of this State may lease the road and appurtenances of any other railway company, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting the lease.

Under its charter, and the statutes of the State, the Atchison, Topeka &

Santa Fe R. Co. cannot only lease a Colorado railroad, but can also lease roads in New Mexico, Arizona, and old Mexico, if each road so leased thereby becomes, in the operation thereof, a continuation and extension of the road of the Atchison Co.

Upon the facts disclosed in this case, the Atchison, Topeka & Santa Fe R. Co., under its charter and the statutes of the State, had authority to accept the stock of the Sonora R. Co., of Mexico, and guaranty its mortgage bonds.

The statute expressly provides, if a court or judge deem it proper that the defendant, or any party to the suit, shall be heard before granting a temporary injunction prayed for, that reasonable notice may be given to such party, and in the mean time a restraining order may be issued. Therefore a court or judge should never grant a temporary injunction in an action involving large pecuniary interests, or other important matters, without notice, where the party to be affected thereby can be readily notified, except in case of extreme emergency. The hasty and improvident granting of temporary injunctions, without notice, is not in accordance with a fair and orderly administration of justice.

ERROR from Wyandotte county.

Geo. W. McCrary, James Hagerman, and Peck & Johnson for plaintiff in error.

Waters & Chase and Henry M. Cheever for defendant in error.

HORROR, C. J.—The facts in this case, as they appear from the record, are substantially these: The legislative assembly of the Territory of Kansas incorporated, in 1859, "The Atchison & Topeka R. Co." FACTS. The company was authorized to survey, construct, and operate a railroad, with one or more tracks, from Atchison, on the Missouri river, to Topeka, and to such point on the southern or western boundary of the Territory, in the direction of Santa Fe, New Mexico, as might be most convenient and suitable for the construction of the road; and it was also authorized to build a branch of the road to any point on the southern boundary of the Territory of Kansas in the direction of the Gulf of Mexico. On November 26, 1863, the name of the company was changed to "The Atchison, Topeka & Santa Fe R. Co." After its organization the company proceeded to build its line of railroad, so that it was put in operation from Topeka to Newton, April 15, 1872; from Newton to Dodge City, September 15, 1872; and from Dodge City to the western boundary of the State, in the direction of Santa Fe, New Mexico, January 1, 1873; making a distance altogether of over 470 miles. From the terminus of the railroad on the western boundary of Kansas to the boundary line between Colorado and New Mexico, the Pueblo & Arkansas Valley R. Co. built a line of railway, and completed the same on July 10, 1879, a distance of about 170 miles. From the terminus of the Pueblo & Arkansas Valley R. to San Marcial, New Mexico, the New Mexico & Southern Pacific R. Co. built a line of railway, a distance of over 353 miles, which was put in operation

October 1, 1880. From San Marcial to Deming, a point on the Southern Pacific railroad, distant from San Marcial a little over 129 miles, the Rio Grande, Mexico & Pacific R. Co. built a road, which was finished March 20, 1881. The Sonora R. Co., Limited, is a corporation organized to build and operate a railway from the boundary line between the United States and Mexico to Guaymas, on the Gulf of California, 262 miles in length. In 1881 this company had completed only 90 miles of its railway from Guaymas, extending in a northerly direction towards the said boundary line.

It was the intention of the directors of the Atchison Co. to have built an independent road from Deming to the Mexican boundary to connect with the Sonora road, but in 1881, a satisfactory proposal having been made by the Southern Pacific R. Co. for the joint use of so much of its track as might be required, an agreement was made between the two companies, subject to termination by either party giving two years' notice to the other, by which the Atchison Co. was permitted to run its trains, with the same rights as the Southern Pacific trains, over the Southern Pacific road from Deming to Benson, a distance of 174 miles. From Benson the Atchison Co. built a road called the New Mexico & Arizona R., to connect with the Sonora road at or near Los Nogales, on the Mexican border, about 97 miles long. The Sonora R., extending from Guaymas to Nogales, was completed on November 25, 1882. In 1881 the directors of the Atchison Co. entered into a contract with the Sonora Co., by which the capital stock of the Sonora Co., amounting to \$5,248,000, was transferred to the Atchison Co. in consideration of the issuance and delivery of \$2,700,000 of the capital stock of the Atchison Co. to the Sonora Co., and the guaranty by the Atchison Co. of the interest, at 7 per cent per annum, of \$5,240,000 of the first-mortgage bonds of the Sonora Co. Four million and fifty thousand of the bonds so guarantied have been marketed, and \$1,190,000 of the bonds are in the treasury of the Atchison Co. Ever since the purchase of the Sonora stock, and the guaranty of the interest on its bonds by the Atchison Co., the Sonora road has been operated by the Atchison Company, and its expenses have been borne by that company. The annual interest on the bonds of the Sonora Co. so guarantied by the Atchison Co. amounts to the sum of \$283,500 a year, and is payable in July and January of each year.

On December 16, 1885, John W. Fletcher, of the city of Detroit, Michigan, claiming to be the owner of 200 shares of the capital stock of the Atchison Co., of the value of \$17,000, commenced this action in the district court of Wyandotte county, in this State, for the purpose, among other things, of cancelling the contract between the Atchison Co. and the Sonora Co., by which the Atchison Co. agreed to guaranty the interest on its bonds; to discharge the Atchison Co. from all liability

in respect to the guaranty; and to enjoin the directors and agents of the Atchison Co. from any further payment of interest on the bonds. The petition was presented to the district judge in vacation, who, without notice to defendants, or either of them, granted a preliminary injunction, as prayed for, against the Atchison Co., its directors, officers, and agents, from paying any interest on the bonds of the Sonora Co. The amount of the undertaking fixed by the district judge upon allowing the injunction was \$1000 only. The Atchison Co. subsequently appeared before the judge and excepted to his ruling, and at once brought the case to this court upon petition in error for the purpose of raising the question whether the injunction was properly granted.

The most important inquiry is whether the petition, taking all of its allegations to be true, shows that the contract of guaranty complained of was *ultra vires*. Upon the part of plaintiff below it is contended that this contract was entirely unauthorized by the charter of the Atchison Co., and beyond the power of the directors of that company to consent to or to execute, and therefore wholly void and of no binding force upon the corporation or its stockholders. On the part of defendants, the claim is that under the powers conferred upon the Atchison Co. by its charter, the subsequent legislation of this State, and the general principles of law applicable to corporations, the contract was and is valid in every respect.

The petition alleges that during the years 1882, 1883, 1884, and 1885 the operating expenses have been greater than the earnings, and but for the guaranty of the Atchison Co., that the Sonora bonds would be worthless. The petition further alleges that if the Atchison Co. continues to operate the Sonora road, and keeps the guaranty of its bonds good, it will be at the cost of the depletion of its treasury, and will render the dividends upon its stock less in amount than they otherwise would be. The question before us, however, is one of power. If the Atchison Co. had the authority to accept the stock of the Sonora Co., and guaranty its mortgage bonds, it is liable on the guaranty, whether the Sonora road be a sucker, sapping the very life of the Atchison Co. as a consumer of its earnings, or a feeder, filling to overflowing a plethoric treasury. Common honesty will forbid a corporation, as it will a private individual, from evading the terms of a contract upon the ground merely that it has been unexpectedly expensive, and therefore not remunerative. In this connection, perhaps, it should be said that the directors of the Atchison Co. still insist that the contract with the Sonora Co. will prove very desirable and profitable in the end. They go further, and say that the Atchison Co. and its stockholders have already received benefits from the con-

CONTRACT OF
GUARANTY—UL-
TRA VIRES.

POWER TO
GUARANTY
BONDS OF SONO-
RA CO.

tract by the acquisition of connecting roads, and the extension of their line, so as to make a through route, which was absolutely necessary to the financial success of their company; and that thereby the earnings and profits of the line, as a whole, have been largely augmented. As to the wisdom or expediency of the execution of the contract between the Atchison and Sonora companies, as an original proposition, we have nothing to do. Whether the contract between these companies be a productive or an unfortunate one for the Atchison Co. is immaterial to our determination of this case. The question with us is whether the contract was within the scope of the powers of the Atchison Co. to execute or perform, under any circumstances or for any purpose, not whether the Atchison Co. made a good or bad bargain.

Notwithstanding the terms of the charter of the Atchison Co., the various provisions of the statute, and the unwritten law of comity that a corporation will be recognized and permitted to prosecute its lawful enterprises in every State which has not expressly refused its consent, the senior counsel representing the plaintiff insists that the Atchison Co.

LIMITED POWER
OF ATCHISON CO.
TO OPERATE.

has no legal right, by purchase, lease, or other arrangement, to operate its road, or run its cars as a part of its own system, beyond the territorial limits of Kansas. The proposition of another counsel representing the plaintiff is that while the Atchison Co. is not confined exclusively to the limits of the State, yet that the road beyond the New Mexico line is operated without legal authority. Very able arguments were presented by the several counsel upon the hearing of the case, and very elaborate briefs have been filed with us. We have given all of these careful attention and examination, and have reached the conclusion, after much deliberation of the serious matters involved, that the proposition asserted by counsel of plaintiff limiting the power of the Atchison Co. in its operations wholly to the State of Kansas, or to adjoining States, is unsound, and receives no support in the sections of the statute cited, or in the authorities controlling. The petition assumes that the acquirement by the Atchison Co. of the intermediate links between the Kansas line and the Sonora line was unauthorized; but the allegations are indefinite as to the actual relations existing between these intermediate links and the Atchison Co. We think, however, it is sufficiently shown that the Atchison Co. is operating its line of road from Atchison and Kansas City to connect with the Sonora road at Nogales, on the Mexican border. It is a general rule that the allegations of a pleader shall be taken most strongly against himself, and therefore we are not to assume that the directors of the Atchison Co., in their arrangements for operating their line from Kansas to Mexico, are acting contrary to the purposes for which the corporation was created. The presumptions are, in the absence of allegations of

facts to the contrary, that the Atchison Co. is acting under, and in accordance with, the provisions of its charter, and the statutes conferring authority upon it. *Railroad Co. v. Davis*, 3 Kan. —;

It is a general rule that the corporations of one State will be permitted to carry on their business, and extend their operations, in other States and countries, so long as they do not depart from the terms of the charters

PLACE OF OPERATION—TERMS
NOT OF CHARTER.

under which they were originally created. Under the comity of States, or, rather, we should say, under the comity of nations, the Atchison Co. can exercise all the powers granted by its charter in Sonora, or in the other States of Mexico, as well as it can in Missouri, Colorado, or New Mexico, if its powers thus exercised are not repugnant to or prejudicial to the interests or laws of Mexico; therefore, that the Sonora road is in a foreign country does not, we think, affect the case. In fact, a corporation is clothed everywhere with the character given by its charter, and the capacity of corporations to make contracts beyond the States of their creation, and the exercise of that capacity, are supported by uniform, universal, and long-continued practice. *Land Grant R. Co. v. Board of Co. Com'rs of Coffey Co.*, 6 Kan. 245; *O'Brien v. Wetherell*, 14 Kan. 616; *Bank of Augusta v. Earle*, 13 Pet. 519; *Cowell v. Spring Co.*, 100 U. S. 55.

Hundreds of corporations are created not strictly local in their character, as in the instance of banks and insurance companies, all of which transact business in all sections of the country. To illustrate the frequency with which corporations exercise great powers in foreign countries, counsel for defendants, upon the argument, cited the East India Co., chartered in England, but doing business throughout the East Indies; the Pacific Mail Steamship Co., a New York corporation, operating a line of steamers from New York City *via* Panama to San Francisco; the Western Union Telegraph Co., a New York corporation, having its offices in almost every city of the Union; the Maxwell Land Co., a Netherlands corporation, owning vast estates in New Mexico; and it was asserted by the same counsel that the Sonora Co., alleged in the petition to be a Mexican corporation, is in fact a corporation created under the laws of Massachusetts. We may also refer, among many others that might be named, to the following corporations: the Colt's Patent Fire-arms Manufacturing Co., although an American corporation, trades extensively in England; the Liverpool, London & Globe Insurance Co., the Royal Insurance Co., the Sun Fire Insurance Co., Limited, the Phoenix Assurance Co., of London, are all English corporations, but they transact business in many States of the Union; the North British & American Insurance Co., the Norwich Union Fire Insurance Society, and the Queen Insurance Co., and other English corporations, write

CORPORATIONS
NOT STRICTLY
LOCAL.

risks in Kansas; the Western Assurance Co. is a Canadian corporation, accepting fire risks in this State; the Panama R. Co. was incorporated in New York, and built a road across the Isthmus of Panama; the Wells-Fargo Express Co., one of the greatest of the common carriers, is a Colorado corporation. It is a matter of general knowledge that many cattle companies recently chartered in England now transact business, involving millions of dollars, in the Western Territories.

It is well settled that a railway corporation may contract to carry beyond the terminus of its own line, and such a contract will be valid, although requiring transportation in another State or country.

CARRIAGE BE-
YOND TERMINUS
OF LINE.

Railroad Co. v. Beeson, 30 Kan. 298; s. c., 12 Am. & Eng. R. R. Cas. 52; Hutch. Carr. §§ 144, 152.

The Narragansett Steamship Co. was, and perhaps is now, a common carrier between New York and Fall River. It receipted for a trunk to be delivered at Boston. The trunk failed to reach its destination, and, in an action against the company by the owner for its value, it was decided that the company was bound to carry the trunk to Boston the same as if its vessels went to that city, and was therefore liable for the loss. *Berg v. Company*, 5 Daly, 394. And the weight of authority is that a railway company deriving its powers to engage in business from its charter, which, by the very terms thereof, is limited to the road between certain designated points, can bind itself as a common carrier beyond its designated line. *Perkins v. Railroad Co.*, 47 Me. 573; *Bissell v. Railroad*, 22 N. Y. 258; Hutch. Carr. § 153, and cases cited. If railway corporations may contract for the transportation of freight and passengers in other States, and beyond their chartered *termini*, why may not such a company convey, in its own cars and trains, freight and passengers over connecting and continuous lines in other States, if it can make arrangements with such connecting and continuous lines so to do?

It is the necessary deduction from the principles announced in the foregoing decisions that if the Atchison Co. is empowered by its charter and the statutes of Kansas to lease, or by any other

CONSTRUCTION
OF CHARTER OF
ATCHISON CO.

arrangement to run, its cars outside of the State, it can exercise that power everywhere, and as well in Mexico as in Colorado or Arizona. This brings us to the construction of the charter of the Atchison Co., and the legislature of the State conferring rights and powers upon railroad corporations. In interpreting the powers possessed by a corporation, we must look to the intention of the legislature in the enactment of the statute. It is manifest the legislative assembly of the Territory of Kansas, in granting the charter to the Atchison Co., anticipated that some day the road would become a part of a transcontinental line, and thereby that Kansas, by reason of its geographical location, would have passing over it the great traffic

of the country,—east and west, north and south,—because it provided for building its road in the direction of Santa Fe, and also of the Gulf of Mexico.

Section 1 of said charter reads :

“That C. K. Holliday, Luther C. Challiss, Peter T. Abell, . . . with such other persons as may associate with them for that purpose, are hereby incorporated a body politic and corporate, by the name of the Atchison & Topeka R. Co.; and under that name and style shall be capable of suing and being sued, impleading and being impleaded, defending and being defended against, in law and equity, in all courts and places; may make and use a common seal, and alter or renew the same; be capable of contracting and being contracted with; and are hereby invested with all powers and privileges, immunities and franchises, and of acquiring, by purchase or otherwise, and of holding and conveying, real and personal estate which may be needful to carry into effect fully the purposes and objects of this act.”

Section 20 of said charter gives express authority “to make such contracts and arrangements with other railroads which connect with or intersect the same as might be mutually agreed upon by the parties, for leasing or running their roads, or any part thereof, in connection with roads in other States, and to consolidate their property and stock with each other; . . . and to have all the powers, privileges, and liabilities that they may hold by their several charters.” Then the additional authority was granted by the first and second sections of chapter 92, Sess. Laws 1870, whereby the Atchison Co. could consolidate with a connecting road, and a company of this or an adjoining State could lease the road of the Atchison Co. The limitations in these sections providing for consolidation and extension were that the lines of the road consolidated should, when completed, form a continuous line of railroad, and when a company leased its road to another railroad company, the line of the road should so connect with the leased road as to form a continuous line. We think a fair construction of section 3 of that act to be that any railroad company may lease its road and appurtenances to any Kansas company when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting such lease. The section is as follows:

“That any railroad company shall have power to lease its road and appurtenances to any railway corporation organized under the laws of this State; or of any adjoining State, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting such lease.”

The only difficulty in the construction of this section arises from the words “or of any adjoining State;” but it may be that these

words refer to a corporation of an adjoining State that has come into the State and leased a Kansas road under the terms and conditions of the statute. If, however, the legislature was inadvertently legislating in said section 3 for a railroad company of another State to lease a road not touching Kansas, we do not think this would vary the construction we have given to the other portions of the section. In the second section the law allows the road of an adjoining State to come in and lease a Kansas road, and a Kansas company to lease the road of another Kansas company, and then the broad authority is given in section 3 for any railway company, organized under the laws of this State, to lease the road and appurtenances of any other railway corporation, when the road so leased shall thereby become, in the operation thereof, a continuation and extension of the road of the company accepting such lease. If section 3 was intended merely to give a Kansas railroad company the power to lease another Kansas railroad, it is but a repetition of said section 2, and the whole of said section is meaningless and useless; but if the section be given the interpretation as stated, it has full force and operation, and permits any Kansas railroad company to lease any other railway, whether in or out of the State, when the road so leased shall thereby become, in the operation thereof, a continuation of the Kansas company.

In 1873 the legislature passed a further act, which reads:

"That it shall be lawful for any railroad company created by or existing under the laws of this State, from time to time, to purchase and hold stock and bonds, or either, or to guaranty the payment of the principal and interest, or either, of the bonds of any other railroad company or companies, the line of whose railroad, constructed or being constructed, connects with its own."

Under the construction we have given to its charter and the statute, the Atchison Co. had the right to lease the road and appurtenances of any railway company in Colorado, New Mexico, or Arizona, or elsewhere, when the road so leased, in the operation thereof, formed a continuation or extension of the Atchison road. Under this power, we think the Atchison Co. not only could lease a Colorado road, which is conceded by one of the counsel of plaintiff, but could go on and lease all the intermediate links between Kansas and Mexico, and when it came to the border of Mexico it could also lease the Sonora road. Each road so leased would form, within the terms of the statute, in the operation thereof, a continuation and extension of the Atchison road. Having all this power, then clearly, under its charter and the Laws of 1870 and 1873, the Atchison Co. had full authority to purchase and hold the stock and bonds of the Sonora Co., and to guaranty the payment of the interest of the bonds of that company, because the line of that road, as constructed, connects with its own.

There is no force in the proposition that there is a missing link

between Deming and Benson, a distance of about 174 miles, and therefore that the Atchison road does not continue and extend *via* the New Mexico & Arizona R. to the Sonora R. at Nogales. It is true the Southern Pacific built this link, and may be said to be its owner, but the Atchison Co. has a general use thereof with the Southern Pacific, and has the same rights therein as that company. It virtually has a lease thereon, because it is in the possession of and operating it with such rights of ownership, or as lessee, as is necessary for all running or operating purposes. *Van Hostrup v. Madison*, 1 Wall. 291; *Schnyder Co. v. Thomas*, 98 U. S. 169; *Mayor v. Railroad Co.*, 21 Md. 50.

Something has been said about the contract between the Atchison and Sonora companies being void, because the Atchison Co. was not actually connected at Nogales at the time of the execution of the guaranty. Even if there was anything in the proposition, in view of the terms of the statute of 1873, providing for the guaranty by one railroad company of the bonds of another company, whose road was being constructed so as to connect with its own, we are clearly of the opinion that as to the bonds marketed, and in the hands of *bona-fide* holders, the contract between the companies is binding. "Where the statute confers express authority upon the company to guaranty the bonds of another company, a mere failure on the part of the guarantying company to pursue the mode specified in the statute will not invalidate such guaranty in the hands of the *bona-fide* holder." *Wood, Ry.* § 188; *Arnot v. Railway Co.*, 67 N. Y. 315; *Parish v. Wheeler*, 22 N. Y. 494; *Thomas v. Railroad Co.*, 101 U. S. 86; *Field, Corp.* §§ 263-267; *Bradley v. Ballard*, 55 Ill. 413; *Field, Ultra Vires*, 185; *Town of Coloma v. Eaves*, 92 U. S. 484; *Peoria, etc., R. Co. v. Thompson*, 7 Am. & Eng. R. R. Cas. 101, 118; *Gelpcke v. City of Dubuque*, 1 Wall. 175; *City of Lexington v. Butler*, 14 Wall. 282; *Supervisors v. Schenck*, 5 Wall. 772; *Bank v. Globe Works*, 101 Mass. 57.

The Sonora road was completed to Nogales in 1882, and the Atchison Co., having been in connection with and operating that road ever since, and having repeatedly paid interest on the Sonora bonds, has clearly ratified the contract of 1881, and therefore the guaranty of the Sonora bonds is not only valid in the hands of *bona-fide* holders, but such contract or guaranty is valid for all the purposes for which it was executed.

Counsel for plaintiff object to any and to all powers granted the Atchison Co. subsequent to the creation of its charter in 1859, and in support thereof say that the relation between the corporation and stockholders is one of contract; that the stockholder subjects his interest to the control of the proper authorities to accomplish the object of the organization, but does not agree that the purpose shall be changed in its character at

CONTRACT BE-
TWEEN ATCH-
ISON AND SONORA
COMPANIES.

GUARANTY OF
SONORA BONDS
VALID.

RELATION BE-
TWEEN CORPO-
RATION AND
STOCKHOLDERS.

the will of the directors or a majority of the stockholders; and that the contract between the corporation and the stockholders cannot be changed without the consent of the contracting parties, by the legislature, or any other authority. We concede that where the power is not reserved in the legislature to repeal or amend a charter, that, so far as the charter states a compact between the corporation, it cannot be changed or repealed by the legislature, but it is settled that the legislature may authorize a body of corporators to exercise new powers or franchises without impairing those previously granted, and if the new powers can be exercised without a departure from the original compact between the corporators, there is no reason why they should not be accepted and exercised on behalf of the company by a majority of the stockholders.

The special point was made in the case of *Union Pac. R. Co. v. Atchison Co.*, 26 Kan. 669, that as the charter of the latter company made certain provisions for exercising the right of eminent domain, the company could not proceed to exercise that right under the general railroad law. It was held that it could, and that the general law applied to all corporations. We said in that case, "If a company had no right of eminent domain given by its special charter, the State legislature could, by general law, endow it with such right; and if it had the right, the legislature could, by a similar law, enlarge its modes of proceedings." All the legislation of the State that we have referred to is in harmony with the terms and provisions of the charter of the Atchison Co.; therefore no franchises are diminished, no contract impaired. At most, its powers are enlarged to carry out successfully the object of its incorporation. So to speak, auxiliary powers are added, but its charter not violated, or the benefits thereby granted infringed. *Clearwater v. Meredith*, 1 Wall. 25; *Sprigg v. Company*, 46 Md. 67; *Green's Brice's Ultra Vires*, 80, 84; *Fry v. Company*, 2 Metc. (Ky.) 314.

For many purposes, the Atchison Co. can receive, in the transaction of its legitimate business in this State, bonds and other negotiable paper; and having received such negotiable instruments, it may sell and dispose of the same; and in selling and disposing of the same, it may guaranty that they are genuine, and it may also guaranty the payment thereof. Therefore, if the Atchison Co. had no authority under its charter and the statutes to run its cars through Colorado, New Mexico, Arizona, and Sonora to the Gulf of California, and was wholly confined to the transaction of its business within the territorial limits of the State, we think, within the power conferred by its charter, its guaranty of the Sonora bonds would be binding upon the company in the hands of parties purchasing them with such guaranty, in good faith, and without notice. *Pendleton v. Amy*, 13 Wall. 297; *Railroad Co. v.*

Howard, 7 Wall. 392; Arnot v. Erie R. Co., *supra*; Bigelow, Estop. 467; 16 Am. & Eng. R. R. Cas. 488.

As to the equities in this case, nothing is disclosed beneficial to the plaintiff. If he was a stockholder of the Atchison Co. in 1881, at the time of the execution of the contract of guaranty with the Sonora Co., he appears before the court as a POSITION OF PLAINTIFF. participant, watching the venture, and, if successful, willing to enjoy the fruits thereof; but as the experiment, in his opinion, has failed, he turns to the court for assistance to repudiate its terms. If he is a recent purchaser of the stock, he ought to have known from the records of the company the terms and conditions of its contracts, and hence was a purchaser with full knowledge of the guaranty of the Sonora bonds. Under such circumstances, he may be said to have purchased for the purpose of becoming a litigant, not merely to prevent a contemplated transaction, as in the case of Du Pont v. Northern Pac. R. Co., 18 Fed. Rep. 467, but to annul a contract guarantying bonds, already executed,—at least so far as the innocent purchasers thereof are concerned. Millions of the bonds have gone upon the market, and have passed in the hands of *bona-fide* holders for value. Very cogent reasons should appear before a court of equity should interfere. They do not so appear. High, Inj. § 1206; Thompson v. Lambert, 44 Iowa, 239; Gregory v. Patchett, 33 Beav. 595; Watts' Appeal, 78 Pa. St. 370; Chapman v. Railroad Co., 6 Ohio St. 120; Terry v. Lock Co., 47 Conn. 141; Samuel v. Holladay, 1 Woolw. 400; Goodin v. Canal Co., 18 Ohio St. 169.

It was said upon the argument by counsel for plaintiff that it is gross injustice to its stockholders for the Atchison Co. to plant its money or property in a foreign country. To this it may be answered: The stockholders control the company. The MATTERS OF POLICY FOR DIRECTORS. directors are elected or chosen by the stockholders, and it goes without saying that the stockholders, as well as the directors, should have at heart the highest interests of the company. Of course, the directors must have some power to determine what is for the best interest of the company, and some discretion must always be left for them to exercise. Matters of policy and expediency, within the terms imposed by the charter and the statutes of the State, are for their consideration and determination, subject to the will of the stockholders, to whom they are responsible, and by whom they are elected. "Railroads, as all know, are things of growth. They enlarge with the development of the country" (Railroad Co. v. Atchison Co., *supra*); and railroading is a business wherein progress is absolutely necessary. A railroad cannot stand still. It must either get or give up business. It must make new combinations, open new territory, and secure new traffic, or lose its business and reduce its revenues. The directors must consider all of these things in their management of the affairs of such

a corporation. In concluding this part of the subject, we may say, further, that the petition nowhere charges the directors of the Atchison Co. with incapacity, collusion, corruption, or fraud. It attacks the integrity of the system of the Atchison Co. beyond the limits of the State, but not the integrity of its officials.

This disposes of the case. A few words, however, concerning the action of the district judge in granting the temporary injunction. It is unnecessary to decide whether he was INJUNCTION WITHOUT NOTICE guilty of an abuse of judicial discretion sufficient of itself to cause a reversal of this case, but the practice of granting injunctions without notice to defendants, except in case of extreme emergency, deserves condemnation; and the granting of an injunction in such an important case as this, without notice, when it is within the general knowledge of every attorney and judge that the Atchison Co. has an officer or agent in every county of the State through which its road runs upon whom legal process may be served, is very censurable. The semi-annual interest upon over four millions of bonds was intended to be tied up by the order of the district judge, which bonds, according to the petition itself, have been marketed, and the holders are very numerous. In addition to this, the order would naturally depreciate the value of the bonds in the markets of the world, and thus innocent purchasers thereof become the immediate and the greatest sufferers. The statute provides if a court or judge deem it proper that the defendant, or any party to the suit, should be heard before granting the injunction, it may direct a reasonable notice to be given to the party to attend for such purpose at a specific time and place, and may, in the mean time, restrain the party. If there was ever a case where defendants should have been notified and heard before the granting of a temporary injunction, this is one. Under the statute, instead of issuing a temporary injunction in the first instance, the judge, if proper facts had been presented to him, might have issued a restraining order, and directed notice to be given. The granting of a temporary injunction, under the circumstances, was not in accordance with a fair and orderly administration of justice.

The order granting the temporary injunction will be reversed. the injunction will be wholly dissolved, and the case remanded for further proceedings in accordance with the views herein expressed.

(All the justices concurring.)

MILLS *et al.*

v.

CENTRAL R. CO. OF NEW JERSEY *et al.**(Advance Case, New Jersey. February 6, 1886.)*

The provisions in the Act of 1880, P. L. 1880, 231, authorizing railroad corporations to lease their roads, etc., simply confer the right to do the acts or exercise the power given, after first obtaining the consent of those affected thereby, or by payment of satisfactory compensation to them for their interests in the property.

The Act of 1881, P. L. 1881, 222, providing for consolidation and merger of certain railroad corporations, gives those corporations no express power to lease their roads.

Power to consolidate does not involve power to lease, and it does not enlarge the power to convey lands, etc., conferred by the charter of a railroad corporation.

The Act of 1854, P. L. 1854, 524, authorizing the Central R. Co. of New Jersey to lease and operate any railroad intersecting with its road, did not authorize that company to lease its road to other companies.

Subsequent legislation which is prejudicial to the vested rights of the stockholders of a corporation, as between themselves, is invalid, so far as such rights are concerned.

By none of the above acts did the majority of the stockholders of the Central R. of New Jersey have power to lease the road against the will of the minority.

The action of the minority in voting against the ratification of the lease is sufficient proof that it was against their will.

A delay of fifty-four days in bringing suit to set aside the lease is not sufficient to bar the action on the ground of laches.

A petition to set aside the lease will not be refused on the ground that the granting of the petition will be injurious to the petitioners.

Celerity in effecting the lease and activity in accumulating obstacles to granting relief will not secure to the lessees immunity from interference by the court nor prevent it from upholding the rights of the injured stockholders.

BILL to set aside a lease. On final hearing on pleadings and proofs.

The facts of the case appear in the opinion.

Barker Gummere and *H. C. Pitney* for complainants.

B. Williamson, G. M. Robeson, and Kaercher for defendants.

RUNYON, Chancellor.—This suit is brought by Alfred Mills and John H. Lidgerwood, executors of the will of Stephen Vail, deceased, against the Central R. Co. of New Jersey, the Philadelphia & Reading R. Co., and the persons who at the time of filing the bill, August 29, 1883, were the directors of the

FACTS.

latter company. The object of it is to annul a lease made May 29, 1883, by the Central to the Reading, by which the former demised to the latter, for the term of 999 years, its railroads and works and all their appendages and appurtenances, and conveyed to it all its property and assets, real and personal, together with all its rights, powers, franchises, and privileges for the management, maintenance, renewal, extension, alteration, or improvement of the demised railroads and works and their appurtenances. The rent reserved was payments of interest, dividends, rents, etc., for which the Central was liable, and the annual payment of a sum equal to 6 per cent upon the par value of the then outstanding capital stock of that company. The Reading took possession of the property at the date of the lease. The complainants now hold, and did at the date of the lease, 2048 shares of the stock of the Central. They never consented to the lease, and they insist that they are entitled in equity to have it set aside and to have the Central reinstated in the rights and repossessed of the property which were demised or conveyed by that instrument.

The questions to be considered are whether the Central had a right to make the lease without the consent of the complainants; and if not, whether the latter are estopped by their conduct in reference to it from seeking relief in equity against it?

The Central has undertaken to transfer to the Reading all of its railroads and other works, with all of its franchises requisite to maintaining and operating them, for a period so long as to be equivalent in duration to a conveyance in fee, and it has conveyed to the Reading all the rest of its property, real and personal. It has thus, if the lease be valid, divested itself of all of its property, and, abdicating all control of its railroads and other works, turned over, practically forever, the management and operation thereof to the Reading, only reserving to itself the payment of the rent with the right of enforcing it by re-entry, etc., and the benefit of certain covenants.

The lease was made with the consent of a majority only of the stockholders of the Central. It is urged by the defendants that when it was made, the Central had legislative authority so to make it, derived not only under the supplement of 1880, P. L., 1880, 231, to the general railroad law, but also under the 3d section of a supplement to its charter, which supplement was approved March 17, 1854, P. L. 1854, 524, and under the Act of 1881, "to authorize railroad companies incorporated under the laws of this and adjoining States to merge and consolidate their corporate franchises and other property," P. L. 1881, 222. The Act of 1880 declares, among other things, that it shall be lawful for any corporation incorporated under the General Railroad Act, or under any of the laws of this State, at any time during the continuance of its charter, to lease its road or any part thereof to any other corpo-

ration or corporations of this or any other State, or to unite and consolidate, as well as merge its stock, property and franchises, and road with those of any other company or companies of this or any other State, or to do both; and such other company or companies are thereby authorized to take such lease or to unite and consolidate, as well as merge its or their stock, property, franchises and road, with such company of this State, or to do both, etc.

The supplement imposes no condition that the stockholders or any of them shall consent, but is silent on that head. The provision in that act that it shall be lawful to lease or consolidate is merely a legislative authorization; a concession on the part of the legislature, of the power to do that which could not lawfully be done without such authority. It is not an enactment that the directors may, without the consent of the stockholders of the company, lease, consolidate, or merge. Nor is it in effect an enactment that they may with the consent of the majority of the stockholders do so. But the statute is merely an enabling act; a law intended to give, once for all, a general legislative authority to lease, consolidate, or merge. The legislature did not intend to affect the rights of stockholders *inter sese*, and the act does not do so, either expressly or by implication.

It was settled law when the act was passed that, after shareholders had entered into a contract among themselves under legislative sanction, and expended their money in the execution of the plan mutually agreed upon, the plan could not, even by virtue of legislative enactment, be radically changed by the majority alone, and dissentient stockholders be compelled to engage in a new and totally different undertaking; because such action would impair the obligation of the dissenting stockholders' contract with their associates and the State.

CHANGE OF PLAN
AFTER SUBSCRIPTION
TO STOCK
UNLAWFUL.

This was declared by the highest tribunal of the State to be the law, and to be as well supported by every consideration of justice and right as it was firmly imbedded in judicial decision. *Black v. Del. & Rar. Can. Co.*, 9 C. E. G. 455.

The rights of unwilling stockholders are not protected by the Act of 1880, and, inasmuch as their interests cannot be taken or controlled *in invitum*, except under the exercise of the right of eminent domain, it is a legal conclusion from the absence of any provision in that respect, that the legislature did not intend to exercise the right of eminent domain at all, but simply to confer the right to do the act or exercise the power given on first obtaining the consent of those affected, or on payment of satisfactory compensation to such, outside of legislative provisions. *Carson v. Coleman*, 3 Stock. 106; *Boston & L. R. Co. v. Salem & L. R. Co.*, 2 Gray, 1; *Mills, Em. Dom.* § 126.

RIGHTS OF MINORITY OF SHAREHOLDERS.

Where a railroad company, by a vote of a majority of the stock-

holders but without legislative authority, leased its road to another, it was held that the transaction was not valid as against the minority, although the legislature subsequently ratified and confirmed it. *Boston & P. R. Co. v. N. Y. & N. E. R. Co.*, 2 Am. & Eng. R. R. Cas. 300.

The Act of 1881, to which reference has been made, is one "authorizing railroad companies incorporated under the laws of this and adjoining States to merge and consolidate their corporate franchises and other property." It provides for consolidation and merger of companies whose railroads form a continuous line. But the Law of 1880 had already declared that railroad companies might consolidate and merge their stock, property, and franchises. The Law of 1881 provides the method of consolidating or merging in the cases which are within its provisions. It makes it necessary that two thirds of the stockholders of each company shall agree to the change. It is not in terms amendatory of the general railroad law, and it makes no reference to the Act of 1880. It is, in itself, some evidence that the legislature intended by the Act of 1880 to do no more than give its consent to leasing, consolidation, or merger. The Act of 1881 provides that stockholders refusing to agree to the consolidation may have their damages assessed and their stock appraised, and that the company shall pay the damages or take the stock at the appraised value, and that if the value of the stock be not paid within the time limited in the act, the amount of the damages shall be a judgment against the company. The act gives no express power to lease.

But it is argued that the power to consolidate either involves in itself the power to lease, or so enlarges the power given by the charter to purchase, hold, and convey any lands, tenements, goods, and chattels whatsoever necessary or expedient for the objects of the corporation, P. L. 1847, 128, as to create the authority to lease. In *Branch v. Jesup*, 106 U. S. 468, where a railroad company had power by its charter to incorporate its stock with that of any other railroad company, and had also by the charter the ordinary power to purchase, hold, and convey property, real and personal, it was held that the power to incorporate the stock had such an enlarging effect upon the power to sell as to authorize a sale of the railroad and franchises of the company to another railroad company, which issued its stock in the place of that of the selling company to the holders of the latter stock. The stock so issued was accepted by those stockholders, and they all fully acquiesced in the arrangement. The selling company constructed its road under an agreement with the purchasing company, by which the road was to be constructed in sections and the sections, as they were constructed were to be turned over to the latter company, and after the completion of the road the stock of the former company was to be in-

POWER TO CON-
SOLIDATE DOES
NOT INCLUDE
POWER TO LEASE

corporated with that of the latter. The case supports the proposition that a railroad company having the ordinary power to buy and sell property, with power to incorporate its stock with that of any other railroad company, may, under those powers, lawfully sell all its property and franchises to a railroad company with whose stock it incorporates its own. But I am of opinion that power to consolidate does not involve authority to lease, and that it does not enlarge the power to convey lands, etc., conferred by the charter. Power to consolidate is power to take in a partner or to go in as a partner; while power to lease is power to dispose of the whole concern to a stranger. In a consolidation the stockholders of the respective companies still retain, to a certain extent, control of their corporate property; but by a lease the stockholders of the leasing company part with the control of their corporate property and hand it over to others, and abandon their enterprise.

In *Archer v. Terre Haute & I. R. Co.*, 7 Am. & Eng. R. R. Cas. 249, it was held that the grant of power to consolidate does not involve within it power to lease. The Act of 1881 did not authorize the making of the lease.

Nor was it authorized by the 3d section of the supplement of 1854 to the charter of the Central. That section declares that it shall be lawful for the company to purchase or lease or operate any railroad which may connect with or intersect its road, or to guaranty the bonds of such company, or to consolidate the stock of such company with its own, on terms to be mutually agreed upon; but it provides that such purchase or consolidation shall not be made without the assent of three quarters in interest of the stockholders, and that if any stockholder or stockholders shall refuse his or their assent, or if by reason of absence or legal inability such assent cannot be obtained, application may be made by such stockholder or stockholders within three months from the time that the purchase or consolidation shall take effect, to one of the justices of the Supreme Court of this State for the appointment of commissioners to appraise the value of the shares of such stockholder or stockholders, the appraisement not to be less than par; and that thereupon such proceedings shall be had as provided in the charter for condemning lands, so far as they may be applicable. Obviously, that section did not authorize the lease.

ACQUIESCENCE
CONSIDERED.

The defendants insist that the charter of the Central having been granted after the passage of the general corporation law, Rev. p. 178, by the 6th section of which it is provided that the charter of every corporation which shall thereafter be granted by or created under any of the acts of the legislature shall be subject to alteration, suspension, and repeal in the discretion of the legislature, the provision of the Act of 1880 in regard to leasing, etc., is to be regarded as incorporated in the charter itself; and that if so, that act authorized the company to make the lease, and

the directors acting for the company and being its duly constituted agents could, lawfully and effectually, especially with the assent of a majority of the stockholders, execute the power.

But notwithstanding that provision of the general corporation law, subsequent legislation, prejudicial to the vested rights of stockholders as between themselves, is not, so far as such rights are concerned, to be regarded as having constructively existed from the passage of the charter, and is invalid. *Zabriskie v. Hackensack & N. Y. R. Co.*, 3 C. E. Gr. 178.

In that case, referring to the above-mentioned provision for alteration, amendment, or repeal, and to a like one in the charter of the company itself, the Chancellor said that the object and purpose of that provision were so plain and so plainly expressed in the words, that it seemed strange that any doubt should be raised concerning them; that the provision was a reservation to the State for the benefit of the public, to be exercised by the State only; that the State was making what had been decided to be a contract, and it reserved the power of change by altering, modifying, or repealing the contract; and that neither the words nor the circumstances nor the apparent objects for which the provision was made could by any fair construction extend it to giving a power to one part of the corporators as against the other which they did not have before.

Mr. Wood in his treatise on railway law says that, under a reservation of authority to alter, amend, or repeal a charter, the legislature does not acquire unlimited power over a corporation to make alterations in the charter which impair its vested rights; and that such reservation does not sanction a reckless invasion of rights of property or an interference with contract obligations. 1 Wood, R. Law, § 39.

The complainants are entitled to relief in equity, unless by acquiescence they are estopped from claiming it, or by their laches have lost their right to it. There is no evidence of acquiescence. On the contrary, there is clear proof of a refusal to consent to the making of the lease. It appears that of the two executors, Mr. Mills alone attended to this business. He alone voted upon the stock for directors, examined the proposed lease, and attended the meeting called to ratify it. Mr. Lidgerwood, the other executor, seems to have taken no part in the matter. The evidence upon the subject of acquiescence is, according to the testimony of the president of the Central, that prior to the meeting of the stockholders of the Central, which took place May 11, 1883, at which directors were chosen and a resolution was adopted in favor of a lease to the Reading, Mr. Mills on two or three occasions in conversation with him led him to suppose that he was in favor of a lease to the Reading at a rental of 6 per cent upon the stock of the Central, Mr. Mills saying that he thought it was the best thing the

RESERVATION AS
TO REPEAL OF
CHARTER IS NOT
UNLIMITED.

president could do; that on the 11th of May, on his way to the stockholders' meeting, he again said, in conversation with the president upon the subject, that he thought it would be wise to execute the lease; the best they could do for the interest of the stockholders; but on that occasion he added that he was in such a position, as executor, that he would not vote for it himself, because the directions of his testator's will were that the property should not be sold, and he thought that a lease for 999 years was so nearly a sale that he, as trustee, did not think it would be well for him to be a party to it. The president says that Mr. Mills gave that as his reason for not voting for the lease. Mr. Mills at that meeting voted for persons for directors who were understood to be in favor of making the lease, but he did not vote for the resolution, which was then adopted by a majority vote, in favor of a lease. That resolution was that the stockholders approved of the proposed lease and contract to and with the Philadelphia & Reading R. Co. and requested the directors to execute and carry the same into effect immediately upon the company acquiring the legal power to act in the premises by the termination of the receivership. The president of the Central had reported to the meeting that a proposition had been made by the Reading to lease and acquire the property of the Central under a lease and contract for 999 years, which would guaranty 6-per-cent dividends to the stockholders of the Central, commencing to run from September 1, 1883; the first quarterly dividend to be payable on December 1, 1883; and that the board of directors were of opinion, subject to the proper ratification by the stockholders, that after the termination of the receivership, upon the company's obtaining legal power to act in the matter, such lease and contract should be made. That was the proposal referred to in the resolution. Mr. Mills neither voted for nor against the resolution. Between the meeting of the 11th of May and a stockholders' meeting held upon the 6th of July following, to ratify the lease, Mr. Mills called at the office of the Central and read a draft or copy of the lease. On the latter day he met the president of the Central on their way to the meeting, and he then said to the president that he, Mr. Mills, owed it to the president to say that he should that day vote against the lease and against its ratification; to which the president replied LACHES CONSIDERED. that he was sorry for that, and Mr. Mills then said that in his position as trustee he thought it was the best thing for him to do. The president says he thinks Mr. Mills added that he had taken counsel about it. The president further testifies that Mr. Mills expressed no objection to the lease or its terms upon that occasion.

Mr. Mills says that he did not on the day of the stockholders' meeting in May express an opinion that leasing the road to the Reading would be the best thing that could be done for the inter-

est of the stockholders. He says that he was anxious that the road should be put in a good position, and was favorable to anything that would effect that end, but was not sufficiently familiar with the terms which were to be inserted in the proposed lease to express such an opinion.

According to the testimony of the president, while on the 11th of May and prior thereto Mr. Mills expressed opinions in favor of a lease, he on that occasion expressly refused to vote for a lease, and on the 6th of July declared that he felt bound to vote against the lease which was then to be submitted for ratification. He did not vote for the resolution at the meeting of May, and he voted against the lease at the meeting of July. According to the evidence he at most expressed an opinion in favor of leasing, but never voted in favor of any lease. On the contrary, he refused to vote in favor even of the policy of leasing and, when the lease in question was submitted for ratification, he voted against it. He had no interest except as trustee, and it was understood that he was acting in the matter merely in a trust capacity. At the meeting of the 11th of May he said, according to the president's testimony, that in view of the obligations of his trust upon him he did not think it would be well for him to be a party to the making of the lease, and therefore he would not vote for it. He manifestly intended to be understood as not acquiescing and, in fact, he was so understood.

According to the testimony on the part of the defendants, what he said was, that he thought it would probably be the best policy to lease, yet he would not consent that that policy should be adopted. Nor was there anything in this conduct to mislead the defendants, and they were not misled by it. They acted on the assumption that the lease was valid if ratified by only a majority of the stockholders. The lease had not been drawn when the meeting of May was held. The only terms then suggested for it were the lease and transfer of the property on the one hand, and the payment of the rent on the other. Afterward, and it appears to have been about the 26th of May, the terms of the lease were settled upon by the directors of the companies, and it was executed on the 29th of that month, and at that date the Reading took possession of the property. The call for the meeting of stockholders to ratify the lease was dated June 14th. So that the lease had been executed and the lessee was in possession under it two weeks before that call was issued, and over a month before the stockholders' meeting for ratification was held.

Nor are the complainants barred by laches. This suit was begun on the 29th of August, less than two months from the date of the meeting of July. As before stated, the lessee took possession on the 29th of May. The Lehigh & Susquehanna R. which the Central held under lease when the lease to the Reading was made, passed into

the hands of the Reading with the consent of the Central on the 29th of May, the date of the lease in question in this suit. Whatever was done by the Reading on the strength of the lease was done in confidence of the validity thereof, notwithstanding the refusal of some of the stockholders of the Central to ratify or acquiesce. If a stockholder, in order to save his rights in such a case as this, is bound to bring suit, a delay of fifty-four days in bringing it is not, under such circumstances as this case presents, laches. Sixty days is the time given by the statute for filing an answer to a bill; and surely he may, without forfeiting his rights, take as much time to prepare his bill as the defendants would have by law to put in their answer. If a stockholder whose rights are disregarded and trampled under foot makes reasonable haste to bring suit, it is enough. It is to be remembered that he is the injured party; and there is some hardship, to say the very least of it, in requiring him to incur the expense and trouble of a suit to protect his rights against unwarrantable and reckless invasion. It certainly cannot be regarded as being the law that he is to lose his rights unless he brings suit immediately to recover or protect them. If such were the law, minorities of stockholders would often fare very badly indeed. The Reading, in assuming that the assent of the majority of the stockholders of the Central was enough to validate the lease, accepted the hazard of its own subsequent actions, based upon that assumption.

It is urged that to set aside the lease will be injurious, not only to the majority of the stockholders of the Central and to the Reading, but also to the complainants themselves; and to establish this the defendants have undertaken to show that the lease was a profitable and most desirable arrangement for the Central. This might be conceded, and yet the complainants would be entitled to the relief which they seek. When the lease was made, the Central had been declared and decreed by this court to be solvent, and its affairs have been remitted to its hands accordingly. It must, therefore, be held to have been a solvent corporation. It is a matter of public notoriety that the Reading has, since the making of the lease, become insolvent. These considerations, however, cannot control or affect the complainants' right to have the trust property restored to the uses to which by the contract between them and their fellow-stockholders it was devoted. Again, this appeal to the court not to disturb the existing arrangement is an appeal in behalf of the wrongdoers themselves, those by whose action the injury has been done to the complainants.

It is urged that if this court finds that the lease is invalid because it is an infraction of the complainants' rights, it will merely decree payment to the complainants of the value of their stock, to be ascertained here. There are many cases in which where a cor-

poration authorized to take property by the exercise of the right of eminent domain takes it without making compensation, but under circumstances entitling it to the consideration and protection of equity, this court will refuse to disturb its possession or to permit it to be disturbed, provided due compensation, to be fixed by this court, be made. But to take that course in this case would in fact be to condemn the complainants' stock, for which this court has no warrant, and that, too, in the trust and for the protection of those who are without any claim to equitable interference. It is for the legislature to say whether the stock of dissenting stockholders shall be taken, as for a public use, under the exercise of the right of eminent domain. It has not said that it may be so taken in this case. Those who, in such a matter as this, act without the acquiescence of all the stockholders, do so at their peril and must take the consequences if their act be undone at the instance of dissentient stockholders. It may be added, that celerity in effecting their design, and activity in accumulating obstacles to granting relief, will not secure to them immunity, and prevent this court from upholding the rights of the injured.

There will be a decree declaring the lease null and void and the transfer of property thereby made illegal.

Power to lease Road—Ratification of Lease.—See *Ecker v. C., B. & Q. R. Co.*, 1 Am. & Eng. R. R. Cas. 357; *Abbott v. J. G. & K. H. R. Co.*, 2 Ib. 541; *Boston, etc., R. Co. v. N. Y., etc., R. Co.*, 2 Ib. 300; *Peters v. Lincoln, etc., R. Co.*, 6 Ib. 597; *Troy & Boston R. Co. v. Boston, etc., R. Co.*, 7 Ib. 49; *Todhunter v. D. M., etc., R. Co.*, 7 Ib. 67; *Archer v. Terre Haute, etc., R. Co.*, 7 Ib. 249; *Elkins v. Camden, etc., R. Co.*, 9 Ib. 590 and note; *Woodruff v. Erie R. Co.* and note, 16 Ib. 501.

Right of Dissenting Minority of Stockholders to enjoin or set aside a Lease.—A stockholder's relation to his corporation is one of contract. The stock held by him represents his vested interest in the property of the corporation and his vested right to such dividends as the profits of its business enable it to declare. This right to share in corporate property and to receive dividends on the corporate stock held by him being a contract right, cannot be impaired by any majority of stockholders however large. It is therefore the right of any minority of shareholders, and even of the holder of one share of stock, to enjoin a proceeding, or have it set aside, if it has been consummated, whenever it is *ultra vires* of the corporation or in fraud or derogation of his contract rights as a shareholder. Nor can the majority of stockholders meet the application of a minority to restrain illegal corporate action by offer to buy the stock held by the minority. Stock is property whose owners cannot be compelled to sell it, except upon condemnation under the right of eminent domain. In the principal case there was a leasing act involved; but it did not provide that dissenting stockholders should sell their stock to a majority upon proper compensation being made; nor did the act point out any method by which a dissenting shareholder could obtain compensation for any injury resulting to him from a proposed lease. And in such cases it is settled that the legal conclusion is that the legislature did not intend to grant to the majority the power to take the dissenters' stock by exercising the right of eminent domain. *Piscat. Bridge Co. v. N. Hamp.*

Bridge Co., N. H. 85, 70, 71; Boston & L. R. Co. v. Salem & L. R. Co., 2 Gray, 1, 36, 39; Atlantic & P. Tel. Co. v. Chicago, R. I. & P. R. Co., 6 Biss. 158; Carson v. Coleman, 3 Stock. 106, 108, 109. And it is equally well settled that if the legislature did intend by the leasing act that the dissenters' stock should be taken by eminent domain and yet neither made provision for their compensation, nor provided the method therefor, then the act was violative of constitutional provisions in that it proposed to take private property for public use without making compensation therefor. *Thacher v. Dartmouth Bridge Co.*, 18 Pick. 502, 503; *Mt. Washington Road Co.*, 85 N. H. 141, 142; *Eastman v. Amoskeag Manfg. Co.*, 44 N. H. 150; *Watkins v. Walker Co.*, 18 Tex. 590, 591; *Watson v. Trustees*, 21 Ohio St. 667; *State v. West Hoboken*, 8 Vr. 77, 81; *Sage v. Brooklyn*, 89 N. Y. 189, 195. See 1 Perry, Tr. sec. 157, 160; 2 Id. Sec. 920.

Action on Lease—Allegation in Complaint as to Citizenship in Great Britain.—A British corporation sued on a railway lease to recover instalments of rent, alleging that it "is a citizen of Great Britain." Defendant, answering, denied the allegation that plaintiff was a "citizen of Great Britain." *Held*, that both the allegation and the denial as to citizenship were meaningless and immaterial, there being no "citizens" of Great Britain, and the allegation that the plaintiff is a foreign corporation formed in and under the laws of Great Britain being sufficient to show that in the contemplation of law plaintiff is an alien entitled to sue in the circuit court of the United States. *Oregonian R. Co. v. Oregon R. & N. Co.*, 10 West C. Repr. 279.

Estoppel by Judgment in an Action on Lease for Rent.—A covenant in a lease of a railway for a number of years to pay the rent reserved therein in semi-annual instalments is in the nature of a series of undertakings or obligations assumed or incurred at the same time and under the same circumstances; and a judgment in an action to recover any one of these instalments of rent is conclusive of the validity of the lease and the liability of the lessee thereunder in any subsequent action thereon as to any matter or defence that might have been made to the first action. *Oregonian R. Co. v. Oregon R. & N. Co.*, 10 West C. Repr. 279.

Pleadings in Action on Lease of Railway—Issues—Estoppel.—It is not necessary that a corporation formed under the law of Great Britain to construct, own, operate, and lease railways in Oregon should specify in its memorandum of association the termini thereof, and, therefore, an allegation in an answer to a complaint in an action by such a corporation on a lease of its road, that it had not made such a specification, is immaterial. An allegation of fact in an answer which is not, *per se*, a defence to the action, and is not attempted to be made so, by any proper averment, is immaterial. A mere denial of the lessee corporation's power to execute a lease of a railway in an action thereon, by the lessor corporation to recover rent, is a conclusion of law and immaterial. An allegation by the lessee corporation in such action that the lessor's road had no near connection with its road, that the capital stock of the latter was not contributed to operate leased roads, that the lease was not ratified by its stockholders, or that it was signed by its president and secretary without the State of its origin, is immaterial. In an action by the lessor to recover the rent reserved in a lease, an allegation in the answer to the complaint, that the lessee did not occupy the premises during the period for which the rent is demanded, is immaterial, unless it is further alleged that such non-occupation was the direct result of the fault or misconduct of the lessor.

In an action by an apparent corporation on a lease of its railway, to recover an instalment of the rent reserved therein, the lessee is estopped to deny the lessor's corporate existence or power to make such contract. *Oregonian R. Co. v. Oregon R. & Nav. Co.*, 10 West C. Repr. 279.

PENNSYLVANIA R. Co. *et al.* v. ST. LOUIS, ALTON AND TERRE HAUTE R. Co.ST. LOUIS, ALTON AND TERRE HAUTE R. Co. v. INDIANAPOLIS AND ST. LOUIS R. Co. *et al.**(Advance Case, United States. April 26, 1886.)*

In the case of an existing railroad corporation organized under the laws of one State which is authorized by the laws of another State to extend its road into the latter, it does not become a citizen of the latter State by exercising this authority, unless the statute giving this permission must necessarily be construed as creating a new corporation of the State which grants this permission.

Where a lease of a railroad for ninety-nine years contained covenants for the payment of monthly instalments of rent to keep the road in repair, and to keep accounts of all matters connected with its business, as affecting the amount of rent to be paid, which covenants were guaranteed by other parties than the lessee, a bill which shows failure to pay rent, depreciation of the road, and combination of the guarantors and lessee to divert the earnings of the road to the benefit of the guarantors, presents a case of equitable jurisdiction, when it prays for specific performance of the obligations of the lease. In such a case, a suit at law on each installment of rent as it falls due is not an adequate remedy.

Unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers, nor can any other railroad company, without similar authority, make a contract to run and operate such road, property, and franchises of the first corporation. Such a contract is not among the ordinary powers of a railroad company, and is not to be inferred from the usual grant of powers in a railroad charter. *Thomas v. Railroad Co.*, 101 U. S. 71, reaffirmed.

The act of the Illinois Legislature of February 12, 1855, is a sufficient authority on the part of the St. Louis, Alton & Terre Haute Co. to make the lease sued on in this case.

But if the other party to the contract, the Indianapolis & St. Louis Co., had no such authority, the contract is void as to it; and if the other companies had no power to guaranty its performance, it is void as to them, and cannot give a right of action against them.

An examination of the statutes of Indiana, and of the decision of its courts, fails to show, in the one or the other, any authority for an Indiana railroad company to make such a contract as that between the principal contracting companies in this case.

Nor is any authority found in the charters of any of these guarantying companies, or of the laws of the States under which they are organized, to guaranty the performance of such a contract as this, with the parties to it, and the road which it relates to, being outside the limits of these States, and having no direct connection with their roads.

The doctrine that acts may be done and property change hands under void contracts which have been fully executed, with which courts will not interfere, is sound, but any relief in such cases must be based on the invalidity of the contract, and not in aid of its enforcement. While the plain-

tiff in this case might recover, in an appropriate action, the rental value of the use of its road against the lessee company, the other defendants who had received nothing, but had been paying out money under a void contract, cannot be compelled to pay more money under the same contract.

APPEALS from the Circuit Court of the United States for the District of Indiana.

John T. Dye, Stevenson Burke, and Ashley Pond for Pennsylvania R. Co. and others, and Indianapolis & St. L. R. Co. and others.

John M. Butler and J. E. McDonald for St. Louis, A. & T. H. R. Co.

MILLER, J.—These are cross-appeals from a decree of the circuit court for the district of Indiana. The suit was brought in that court by a bill in chancery, filed by the St. Louis, Alton & Terre Haute R. Co., alleging that it was a corporation organized under the laws of the State of Illinois, and a citizen of that State, against the Indianapolis & St. Louis Co., a corporation similarly organized under the laws of the State of Indiana, and a citizen of that State, and against the other corporations mentioned in the bill, as citizens of Indiana, or of other States than the State of Illinois. A final decree was rendered in favor of plaintiff for the sum of \$664,874.70, with costs, and an injunction against several of the defendants, from which both complainants and defendants in the court below have appealed.

1. The first question arising on the record is that of the jurisdiction of the circuit court of the Indiana district, as founded on the citizenship of the parties. This question was raised at an early stage of the controversy by a distinct plea to the jurisdiction, and was overruled by the court. Afterwards, and before the decree, the defendant corporations who had filed this plea withdrew it, and desired to have the case decided on the merits. As it is not competent to any parties to confer jurisdiction on the circuit court by a waiver of objections to it, the question is one which lies at the threshold of any further proceeding, and must be decided. The objection arises out of the admitted fact that the Indianapolis & St. Louis R. Co. is a corporation organized under a statute of Indiana, and is a necessary party to the suit, and the assumption that the St. Louis, Alton & Terre Haute R. Co. is organized under laws of both Illinois and Indiana, and is therefore a citizen of the latter State, as is its principal opponent in the controversy. The complainant company owns a road extending from the Mississippi River, opposite St. Louis, to Terre Haute, Indiana, of which only a very few miles—10 or 12—are within the State of Indiana. The controversy grows out of a lease of this road by the complainant company to the Indianapolis & St. Louis Co. As the complainant company was chartered originally by the State of

Illinois, and is undoubtedly a citizen of that State, and in that character would have the right to sue the other companies in the circuit court for Indiana, do the other facts in the case defeat this right by making it also a citizen of Indiana?

It does not seem to admit of question that a corporation of one State, owning property and doing business in another State by permission of the latter, does not thereby become a citizen of this State also. And so a corporation of Illinois, authorized by its laws to build a railroad across the State from the Mississippi river to its eastern boundary, may, by the permission of the State of Indiana, extend its road a few miles within the limits of the latter, or, indeed, through the entire State, and may use and operate the line as one road by the permission of the State, without thereby becoming a corporation or a citizen of the State of Indiana; nor does it seem to us that an act of the legislature conferring upon this corporation of Illinois, by its Illinois corporate name, such powers to enable it to use and control that part of the road within the State of Indiana as have been conferred on it by the State which created it, constitutes it a corporation of Indiana. It may not be easy, in all such cases, to distinguish between the purpose to create a new corporation which shall owe its existence to the law or statute under consideration, and the intent to enable the corporation already in existence under laws of another State to exercise its functions in the State where it is so received. The latter class of laws are common in authorizing insurance companies, banking companies, and others to do business in other States than those which have chartered them. To make such a company a corporation of another State, the language used must imply creation or adoption in such form as to confer the power usually exercised over corporations by the State, or by the legislature, and such allegiance as a State corporation owes to its creator. The mere grant of privileges or powers to it as an existing corporation, without more, does not do this, and does not make it a citizen of the State conferring such powers. In a case where the corporation already exists, even if adopted by the law of another State, and invested with full corporate powers, it does not thereby become such new corporation of another State until it does some act which signifies its acceptance of this legislation, and its purpose to be governed by it.

We think what has occurred between the State of Indiana and this Illinois corporation falls short of this. The origin of this corporation was a special act of the Illinois legislature of January 28, 1851, chartering the Terre Haute & Alton R. Co. to construct a road from the State line, near Terre Haute, to Alton; and by an act of the Indiana legislature, passed a few days later, this Illinois corporation was permit-

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ted to extend its road through Indiana to Terre Haute. Some changes took place in the name and power of this company by statutes of Illinois, but none which affected its powers derived from the Indiana statute of February 11, 1851. But the property of the corporation was sold out under foreclosure of a mortgage to Robert Bayard, Samuel J. Tilden, Russell Sage, and others, who, under an act of the Illinois legislature, reorganized the purchasers into the corporation called the St. Louis, Alton & Terre Haute R. Co., which is the present company, and which, by the Illinois statute, succeeded to all the franchises of the original Terre Haute, Alton & St. Louis Co. As these included all the powers necessary to operate the few miles of the road in Indiana under the act of February 11, 1851, it was unnecessary to seek an act of incorporation from that State. It appears, however, that Bayard, Tilden, and their associates did file in the office of the Secretary of State of Indiana a certificate of the organization of the new company, with the names of the first directors of it, who were to serve until 1863; and it is argued that this made the St. Louis, Alton & Terre Haute Co. a corporation of the State of Indiana. A critical examination of this certificate renders it very doubtful whether that was its purpose, but rather indicates that it was intended to secure and perpetuate the rights granted to the Terre Haute & Alton Co. by the act of February 11, 1851. At all events, no evidence exists of the agreement of the new Illinois company to accept of or act under this attempt at organization under Indiana laws. They never held an election for directors of the Indiana corporation, if one existed, and they never in any other manner recognized the existence of an Indiana corporation of the same name.

Without going into the question whether the plaintiff in this case, if it were clearly a corporation of both States, could maintain this suit in the Circuit Court under the decisions in this court, we are satisfied that, with reference to its right to sue as a citizen of Illinois, it is not, also, a corporation and citizen of Indiana, under the facts found in this record.

As regards the asserted existence of the Indianapolis & St. Louis Co., under the law of Illinois, by which it is asserted to be a citizen of the same State with plaintiff, the objection is the same as that which was overruled in *Railway Co. v. Whitton*, 13 Wall. 270, and in *Muller v. Dows*, 94 U. S. 444.

2. The next objection to the decree is that the bill does not present a case for equitable relief, and should have been dismissed for want of jurisdiction in chancery. To understand the force of this proposition clearly, it is necessary to make a statement of the case as made by the bill.

It seems that in May, 1867, the St. Louis, Alton & Terre Haute R. Co., plaintiff in the bill, had nearly completed, and was operat-

ing, from Terre Haute to St. Louis, by way of Alton, a road about 189 miles long. From Terre Haute to Indianapolis (about 70 miles) a corporation had been organized under the laws of Indiana to build a road, and probably had built the whole or a part of it. Indianapolis was then a railroad centre of importance, from which roads ran to Chicago and other lake towns, and to Louisville, Cincinnati, and other towns on the Ohio river, and to all the principal cities of the Atlantic coast. At St. Louis, the Terre Haute & Alton road connected with the railroad system of the Mississippi river. Several of these railroad companies whose traffic was east of Indianapolis, and all of whom had connection, direct or indirect, with that city, were desirous of reaching St. Louis with their business, and made proposal to the complainant company for the purpose of accomplishing this result. The companies who executed the agreements to secure this purpose, all of whom were made defendants to the bill, were the Indianapolis, Cincinnati & Lafayette R. Co., the Pittsburgh, Fort Wayne & Chicago R. Co., the Pennsylvania Co., the Bellefontaine Co., the Cleveland, Columbus & Cincinnati Co., and the Cleveland, Painesville & Ashtabula Co. Their proposition was that the Indianapolis & Terre Haute Co. should lease, for a period of 99 years, the part of complainant's road between St. Louis and Terre Haute, and thus, with its own road, make a continuous line between Indianapolis and St. Louis, and the other companies agreed to guaranty the payment of the rent and performance of the other obligations of the Terre Haute & Indianapolis Co., and it was also agreed that if this company refused to execute this operating contract the defendants might procure some other company to build the 70 miles of road from Indianapolis to Terre Haute, and execute the agreement in place of the Terre Haute & Indianapolis Co., and in like manner they would guaranty the performance of its obligations in the lease.

What occurred was that the Terre Haute & Indianapolis Co. refused to execute the contract of lease, and another corporation was organized, under the influence and control of these guarantying companies, to build the 70 miles of road between Indianapolis and Terre Haute, and the line of road between Indianapolis and St. Louis was thus made complete. This company was called the Indianapolis & St. Louis R. Co., and it executed the contract of lease with the complainant company, September 11, 1867. At the same time the guarantying companies, except the Pennsylvania Co., executed a new guaranty as a substitute for the former. The averments of the bill, however, bring in the Pennsylvania Co. as defendant, by alleging that, in its lease of the Pittsburgh, Fort Wayne & Chicago road, it bound itself to perform the obligation of this latter company as one of the guarantors; and that, by signing the original contract of guaranty for the Terre Haute & Indianapolis

Co., it bound itself to the same guaranty for any road substituted in its place; and by the further averment that the Indianapolis & St. Louis Co., which did enter into the contract of lease, was in reality but the creature of the companies who signed the original contract of guaranty, the Pennsylvania Co. included. This contract of lease between the complainant company and the Indianapolis & St. Louis Co. lies at the foundation of all claim for relief in this suit. It is a carefully drawn instrument of 19 articles. It leases out complainant's road from St. Louis to Terre Haute, and a short connecting line of four miles to Alton, for the period of 99 years; and it provides for the absolute control of this road by the Indianapolis & St. Louis Co., called party of the first part, during this period; for its being kept in repair by that company; for the payment of a rent by that company to the party of the second part, the St. Louis, Alton & Terre Haute Co., which should be regulated by the gross income derived from the use of the road, but in no event to be less than \$450,000 per annum.

Some of these articles of agreement, and parts of others important to the issues before us, are as follows:

"Art. 1. The said party of the first part shall, will, and may manage, operate, and carry on the business of a certain railroad belonging to the party of the second part, and known ARTICLES OF AGREEMENT IN LEASE as the principal or main line of the St. Louis, Alton & Terre Haute R., extending from Terre Haute, in the State of Indiana, to East St. Louis or Illinoistown, in the said State of Illinois, and also a certain branch thereof belonging to the party of the second part, and extending from a point on the said main line to Alton, in the said State of Illinois, for and during the period of 99 years from the first day of June, in the present year of our Lord one thousand eight hundred and sixty-seven, upon and subject to the terms and conditions of this indenture, and all and singular the provisions herein contained.

"Art. 2. The said party of the first part shall and will, within a reasonable time hereafter, finish and put in good order and condition any and all unfinished portions of said main line of railroad, or of said Alton branch thereof, and any and all parts or portions of either said main line or said branch which may be in inferior condition or out of repair; and thereafter, at all times during the said period of 99 years, the said party of the first part, its successors and assigns, shall and will keep the said main line of railroad, and the said Alton branch thereof, in the order and condition of first-class western railroads, making from time to time all needful repairs, replacements, improvements of and additions to the same at the proper cost and expense of the said party of the first part, without deduction or abatement, from the moneys hereinafter provided to be paid to the party of the second part; and the said party of the first part shall and will expend, for improvements and equip-

ments upon the said line of railroad, in addition to the ordinary expenses of operation, repair, and replacement, a sum not less in the aggregate than five hundred thousand dollars, before the thirty-first day of December, in the year one thousand eight hundred and sixty-eight.

"Art. 3. The said party of the first part shall and may, for and during the term aforesaid, use and apply to and for the business of said main line and branch railroads any and all depots, stations, station-houses, car-houses, freight-houses, wood-houses, and other buildings, and all machine-shops and other shops, and all depot grounds and other lands adjacent to the said main line and branch railroad, or either of them, or used or acquired for use in connection therewith, including certain depot grounds at East St. Louis aforesaid. . . ."

Article 5 authorizes the lessee company to fix all rates of fare for freight and passengers, with a provision for the protection of other companies, not material here.

"Art. 6. The said party of the first part, keeping and performing all and singular the terms, provisions, and conditions of these presents, and making the payments hereinafter required, shall and may, at all times during the period of ninety-nine years aforesaid, demand, collect, and receive any and all fares, charges, freights, tolls, rents, revenues, issues, and profits of the said main line of railroad extending from Terre Haute to East St. Louis aforesaid, and of the said branch thereof to Alton aforesaid.

"Art. 7. The party of the first part shall, in each and every year of the term of ninety-nine years, pay, or cause to be paid, to the party of the second part, in the manner and at the times hereinafter provided, thirty per cent of the gross earnings of the said railroad from Terre Haute to East St. Louis, and the branch thereof to Alton, until such gross earnings for such year shall amount to the aggregate sum of two millions of dollars; and twenty-five per cent of any excess over two millions of dollars, until the whole earnings for such year shall amount to three millions of dollars; and twenty per cent of any excess over three millions of dollars of gross earnings for such year; and such percentage of the gross earnings for each such year shall be paid over without any deduction, abatement, or diminution for any cause whatever; every demand or claim accruing, or to accrue, to the party of the first part being hereby declared to be chargeable on that portion of the gross earnings which the said party is, by the next succeeding article hereof, empowered to retain as therein provided; but it is hereby expressly agreed that the aforesaid payments shall amount, in each and every year, to at least four hundred and fifty thousand dollars, which is hereby agreed upon as a minimum for each and every year, and it is to be paid absolutely, without reference to the percentage which it forms of the gross earnings of such year, and without

leaving or creating any claim or charge upon the earnings of any future year."

"Art. 15. The said party of the first part shall and will, during the whole period of ninety-years aforesaid, keep just, full, and true accounts of any and all business which shall or may be done upon the said main line of railroad, and the said Alton branch thereof, or upon either or any part of either thereof, and of all moneys earned or received from or on account of such business; and shall render to the party of the second part, monthly during such period, a detailed approximate statement of such business, showing the receipts and disbursements on account thereof; and shall also, annually, to wit, on or before the first day of March in each year, account to and with the party of the second part for any and all moneys earned or received as aforesaid for and during the year terminating with the thirty-first day of December preceding the time of such accounting; and the president of the party of the second part, or an agent duly authorized by the board of directors, shall, at all reasonable hours and times during the term aforesaid, have the right to examine and inspect, and there shall be produced and exhibited to them, any and all books of account wherein shall be entered, or which shall purport to contain, any entry or statement relating to the business done on said main line and branch railroads, or on any part of either thereof, during the term aforesaid, and any and all vouchers relating to such business; and shall also have the right to take transcripts from and copies of such entries or statements, and of such vouchers."

The following is the contract of guaranty, signed by the other railroad companies on the same day that the foregoing lease was signed by the two principal companies; the reference to the operating contract of the seventeenth May, 1867, being to the one prepared for the Indianapolis & Terre Haute Co. which it refused to execute. The recitals are omitted, and only the language descriptive of the contract of guaranty is given:

"Now, therefore, this indenture witnesseth that for and in consideration of the premises, and of the sum of one dollar to each of them duly paid, the receipt whereof is hereby acknowledged, the said parties of the first, second, and third parts to these present, for themselves, their successors and assigns, have covenanted, promised, and agreed, and by these presents do covenant, promise, agree, and guaranty, to and with the said party of the fourth part, its successors and assigns, that the said Indianapolis & St. Louis R. Co. shall and will, at all times hereafter, keep, observe, and perform all and singular the covenants, conditions, and provisions of the said operating contract, bearing date on the seventeenth day of May, in the year of our Lord 1867, and of the said instrument bearing even date herewith, by which the said

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Indianapolis & St. Louis R. Co. has assumed, adopted, or become liable to carry out the said operating contract according to the true intent and meaning thereof: provided, nevertheless, that all the obligations of the parties of the first, second, and third parts thereto, created or intended to be created hereby, shall be several and not joint, and as to each of them, for the equal third part of any and all damages which may arise from any default of the said Indianapolis & St. Louis R. Co., its successors or assigns, in the premises, or for any breach of this agreement by the said parties of the first, second, or third parts thereto."

The bill charges, as violations of the contract of lease, that the Indianapolis & St. Louis Co. has for some time past failed to pay CHARGES OF RENT. the rent as fixed at the minimum of \$450,000 per annum; that it is insolvent, and is in many other respects in default in regard to its obligations under the operating contract; that it has not kept the road adequately furnished with equipments, but has allowed it to run down and depreciate, and has resorted to the use of leased cars and equipments, instead of purchasing and owning the same, and the road is not in the order and condition of a first-class western road, as required by said contract, and that the money which should go to pay complainant is used to pay for the leased cars; that the rails have become worn, and the track out of repair. It is also alleged that the lessee's road is covered by a large mortgage, to secure bonds held chiefly, if not altogether, by the guarantying companies, and, in fact, by means of their ownership of the stock and bonds of that company, they are drawing from it the money which should go to pay complainant's rent, and to purchase rolling stock and repair the road. It is then alleged that suits for the instalments of rent as they fall due, and judgments at law against all the defendants, would be no adequate remedy; that to do this, or resume possession and control of complainant's road for non-performance, would not be sufficient for that purpose; that complainant has a contract with the defendants more valuable than would be the resumption of the possession of the road in its depreciated condition both in respect to the road and equipments and the traffic over it, so largely diminished by construction of the road of the Indianapolis & St. Louis Co. to the Mississippi river at St. Louis by that company, and by the other defendants, on a line nearly parallel to complainant's road, and not far from it. The prayer for relief is that the Indianapolis & St. Louis Co. be required specifically to perform its obligations in all the respects mentioned, and that, in default thereof, the guarantying defendants be required to do so; and that the latter companies be required to perform by paying such of the instalments of minimum rent as the lessee company fails to do as they fall due; that the companies be enjoined from receiving from the Indianapolis &

St. Louis Co. interest on its bonds held by them while it is in arrears for rent; and also enjoined from selling these bonds; and that a receiver be appointed to take such a per cent of the gross earnings of the company as may be necessary to pay the rent due complainant.

We have been thus minute in showing the breaches of the contract alleged in the bill, the condition of the parties as to ability to perform, and the relief sought, because it is said that an action at law for the unpaid rent, as often as the instalments become due, is an adequate remedy, and is all that the defendants are liable for. But we cannot concur in this view of the matter. If the contracts are valid contracts, and the complainant has the rights which are guarantied to it under them, such relief is very inadequate. To sue for every monthly instalment of rent, even if the principal and the guarantors can be sued jointly, is almost equivalent to a denial of justice. If the contract is to continue, and the road to be run by the lessee company, which is insolvent, a monthly resort to a suit at law against the guarantors is destructive of the substantial right of the plaintiff under the contract. Having a valuable contract in regard to the operation of the road for a great many years to come, plaintiff cannot be compelled to forfeit it, and resume possession, and sue for all its damages in one action, because this would best serve the purposes of the solvent guarantors.

The Indianapolis & St. Louis Co. agreed to keep the road, its rolling stock, and its equipment in good condition, equal to a first-class western railroad. The plaintiff has a right to have this done specifically, and is not bound to bring action after action for damages at every stage of this depreciation. These suits would be vexatious, unsatisfactory, expensive, and the relief would be inadequate. A clause in the contract requires the lessee to keep regular accounts of all the matters essential to complainant's rights. The examination of these accounts by a master is eminently appropriate, rather than by a jury. The relief granted by the decree, of enjoining the guarantying companies from collecting the interest on the bonds of the Indianapolis & St. Louis Co. while it is insolvent and in arrears, can only be given in a court of equity. In short, the numerous questions—the complex issues—raised in the case can only be satisfactorily tried in a court of equity, and that court alone can give full, adequate, and complete remedy for the grievances of plaintiffs growing out of the violation of this contract, and adjust the extent and nature of that relief among the parties to it. We are of opinion, therefore, that if the complainant is entitled to any relief on the facts of the case, it is in a court of equity as distinguished from a court of law.

3. It is objected that the contract of lease between the two primary parties to that contract, the lessor and the lessee company,

was one which they had no power to make, and that, still less, had the other defendant companies authority to guaranty its performance by the latter. In the consideration of this question no reference will be had to any want of regularity in the proceedings attending the execution of these agreements, nor to the absence of any such authority as the boards of directors could have given to the officers of the companies who signed the contracts. It is here a question, pure and simple, as to how far the authority to execute these contracts is sustained by the corporate powers which the law has vested in these companies.

A case very much like the present one, as it relates to this point, was before us some six years ago, and the opinion in it establishes for this court the main principles on which the inquiry must proceed. In that case a railroad company in New Jersey had leased its road, franchises, and property for a period of twenty years, yielding, as in this case, complete control of it all to the lessees, and receiving as rent one half the gross sum collected by the lessees from the operation of the road. The agreement contained a condition that the railroad company might at any time terminate the contract and take possession of its property. But in that event they should pay to the lessees the value of the lease for the remaining period of the twenty years to which the lease extended. The company exercised this option, took possession of its road, and the suit was brought to recover on this covenant. *Thomas v. Railroad Co.*, 101 U. S. 71. The decision turned upon the power of the company, under its corporate authority, to make the lease. The plaintiffs in error, who were the lessees, insisted that a corporation may, as at common law, do any act which is not either expressly or impliedly prohibited by its charter, although, where the act is unauthorized, a shareholder may enjoin its execution, and the State may, by proper process, forfeit the charter. To this the court responded: "We do not concur in this proposition. We take the general doctrine to be in this country, though there may be exceptional cases and some authorities to the contrary, that the power of corporations organized under legislative statutes is such and such only as those statutes confer. Conceding the rule applicable to all statutes, that what is fairly implied is as much granted as what is expressed, it remains that the charter of a corporation is the measure of its powers, and that the enumeration of those powers implies the exclusion of all others." The reports of decisions in the English courts were very fully examined, as will be seen by the reported statement of counsel's briefs, and many of them specially referred to in the opinion; also several cases in this court and in the State courts of this country.

It is not expedient here to go again over the ground there considered, as we are of opinion now, as we were then, that the great

preponderance of judicial decisions supports the proposition above stated. It has been distinctly recognized and repeated in this court in the case of *Green Bay & M. R. Co. v. Union Steamboat Co.*, 107 U. S. 98; s. c., 13 Am. & Eng. R. R. Cas. 658.

It is cited with approval in the supreme court of Massachusetts in the case of *Davis v. Old Colony R. Co.*, 131 Mass. 258. This latter opinion is a very full and able review of all the important decisions on that subject, and sustains very clearly the main propositions. In this court the principle is completely covered by the decision of the case of *Pearce v. Railroad Co.*, 21 How. 441, decided in 1858. In that case the defendant companies, whose road at one end of it terminated on the Ohio river, had purchased a steamboat to be used on that river in connection with their freight and passenger traffic, and had given notes for the purchase money. In a suit on these notes this court ruled that they were void for want of any authority in the companies to buy the boat, or to engage in the carrying trade on the river. The opinion delivered by Mr. Justice Campbell cites several of the English cases relied on in *Thomas v. Railroad Co.* and in *Davis v. Old Colony R. Co.*, above referred to, and concludes with the observation that "the opinion of the court is that it was a departure from the business of the corporation, and that their officers exceeded their authority." This doctrine had been previously asserted with great force in the case of *York & Maryland Line R. Co. v. Winans*, 17 How. 30. These are all cases in which railroad companies were parties, and their powers, as regulated by their charters, were the matters mainly considered. There are many other cases of the highest authority where railroad corporations are held to the doctrine laid down in *Thomas v. Railroad Co.*: *Eastern Cos. R. v. Hawkes*, 5 H. L. Cas. 371, 381-381; *Ashbury R. Carriage Co. v. Riche*, L. R. 7 H. L. 653; *MacGregor v. Dover & D. R.*, 18 Q. B. 618; *East Anglian Rys. v. Eastern Cos. R.*, 11 C. B. 775.

We think it may be stated, as the just result of these cases, and on sound principle, that, unless specially authorized by its charter, or aided by some other legislative action, a railroad company cannot, by lease or any other contract, turn over to another company, for a long period of time, its road and all its appurtenances, the use of its franchises, and the exercise of its powers; nor can any other railroad company without similar authority make a contract to receive and operate such road, franchises, and property of the first corporation; and that such a contract is not among the ordinary powers of a railroad company, and is not to be presumed from the usual grant of powers in a railroad charter. We must therefore proceed to inquire if any such powers have been given to the railroad companies engaged in this transaction.

There is found in the record a copy of an act of the Illinois leg-

islature approved February 12, 1855, of which the following is the first section:

"Section 1. Be it enacted by the people of the State of Illinois, represented in the general assembly, that all railroad companies incorporated or organized under, or which may be incorporated or organized under, the authority of the laws of this State, shall have power to make such contracts and arrangements with each other, and with railroad corporations of other States, for leasing or running their roads, or any part thereof; and also to contract for and hold in fee-simple, or otherwise, lands or buildings in this or other States for depot purposes; and also to purchase and hold such personal property as shall be necessary and convenient for carrying into effect the object of this act."

Though it might be said that this act only authorizes Illinois railroad companies to become lessees, we think it must be conceded that this enactment authorized the St. Louis, Alton & Terre Haute R. Co., which we have already said was exclusively an Illinois corporation, to enter into the lease or operating contract found in the record. But if the other party to the contract, the Indianapolis & St. Louis Co., had no such authority, the contract of lease is void as to it; and if the other companies had no power to guaranty its performance, it is void as to them, and the capacity of the complainant to make this contract does not make it valid as against those which had not such capacity, and cannot give a right of action on it against them. In the case of *Thomas v. Railroad Co.*, the lessees were natural persons, with no disability to contract, but they were held to have no remedy on their contract, because it was not binding on the other party for want of a similar power to make the contract.

An act of the legislature of Indiana of December 18, 1865, is relied on as by implication conferring this power. Section 8 is as follows:

"Sec. 8. In case any railroad, or part thereof, shall have been, or shall hereafter be, leased, conveyed, or mortgaged to any other railroad company, and shall be in the possession of such other company, under such lease, conveyance, or mortgage, the road, or part thereof, so leased, conveyed, or mortgaged shall, during the continuance of such possession, be assessed for taxation as the property of the company having such possession, in the same manner as if it were a part of the road of such lessee, grantee, or mortgagee, under its own charter; and such lessee, grantee, or mortgagee shall, during the continuance of such possession, have all the rights, and be subject to all the duties and liabilities, in relation to the road or parts thereof, so held, which are created by this act, and both its property and the road, or parts thereof, so held, with its fixtures and the property used in operating the same, shall be liable for the payment of such taxes, in the

same manner as railroad property is, in other cases, made liable for taxes properly assessed against the same." 3 St. Ind. 420, 421.

It will be seen at once that this is a statute for the collection of revenue, and that to make sure of the payment of taxes due on railroad property the legislature has undertaken to provide that in cases where the possession has passed out of the corporation which owns it, or has the title, it shall be paid by the persons having that possession. Hence, in enumerating this latter class, it speaks of property leased then or thereafter, or conveyed or mortgaged, and makes the holder liable during the continuance of such possession for the taxes. This precise question, only more strongly presented, in favor of the affirmance of the lease by the act of the New Jersey Legislature, was decided in *Thomas v. Railroad Co.*, 101 U. S. 85. The statute in that case having direct relation to the company which had made the invalid lease, passed after the lease was made and in operation, declared it should "be unlawful for the directors, lessees, or agents of said railroad to charge more than three cents per mile for carrying passengers," and the proviso said "that nothing contained in this act shall deprive the railroad company or its lessees of the benefit of the provisions of another act" relative to fares on other railroads in the State. This court said that though "it might be fairly inferred that the legislature knew that the road was operated under the lease in that case, it was not important for the purpose of that act to decide whether this was done under a lawful contract or not." "The legislature was determined that whoever did run the road, and exercise the franchises conferred on the company, and under whatever claims of right this was done, should be bound by the rates of fare established by that act. . . . It is not by such an incidental use of the word 'lessees,' in an effort to make sure that all who collected fares should be bound by the law, that a contract unauthorized by the charter, and forbidden by public policy, is to be made valid and ratified by the State."

So, here, the mention of lessees as possible holders of the possession of railroad property neither implies that they are lawfully so, or that such an absolute transfer of road, appurtenances, franchises, powers, and their control as the one found in this case is authorized by law, nor, though it may be in operation, does it give sanction to or create such a law.

The following section of the act of February 23, 1853, of the Indiana legislature is relied on as authorizing this contract:

"Sec. 3. Any railroad company heretofore organized, or which may hereafter be organized, under the general or special laws of this State, and which may have constructed or commenced the construction of its road, so as to meet and connect with any other railroad in an adjoining State at the boundary line of this State, shall have the power to make such contracts and agreements with any such road constructed in an ad-

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joining State, for the transportation of freight and passengers, or for the use of its said road, as to the board of directors may seem proper." Rev. St. Ind. 1881, § 3973.

We cannot see in this provision any authority to make contracts beyond those which relate to forwarding by one company the passengers and freight of another, on terms to be agreed on, and possibly for the use of the road of one company in running the cars of the other over it to its destination without breaking bulk. In the case of Board of Com'rs of Tippecanoe Co. v. Railroad Co., 50 Ind. 110, this same statute was relied on as supporting the authority to make the lease then under consideration; but the Supreme Court of Indiana said: "That act is to authorize railroad companies to consolidate their stock with the stock of other railroad companies in this and in an adjoining State, and to connect their roads with the roads of said companies; . . . the title nowhere mentions a lease or a sale. Indeed, the words 'to connect their roads with the roads of other companies' would seem to exclude such a conclusion. To connect one road with another does not fairly mean to lease or to sell it." This was said in a case where the whole question turned on the power of one railroad company to make, and the other to receive, a lease of the road. It is cited in the brief of counsel for complainant as sustaining the doctrine that in Indiana the right of railroad companies to lease their roads to other companies is recognized by the judiciary of that State. We think it proves the opposite. The lease in that case was held void as being *ultra vires*. All the arguments of the court are based on the proposition that the corporation can do no valid act unauthorized by statute, and can make no contract in contravention of public policy; and while it says: "We do not decide that railroad companies cannot become lessors or lessees of other railroad companies, for the purpose of running their lines in conjunction, facilitating commerce, travel, and transportation, or for any legitimate purpose for which railroad companies are organized, and there is much in the legislation of the State favoring this view, and many decisions sustaining the advancing enterprise of the country,"—it adds: "But all such contracts must come within the powers of the corporation, must not exceed the powers of the agency that makes them, must not violate the rights of stockholders, or contravene public policy." We look in vain in this latest decision of the State for any assertion of the proposition that, by the laws of that State or by the decisions of its courts, there exists any law by which one railroad company can, by lease or by any other contract, make an absolute surrender of its road and its franchises to another. And yet that was the question under discussion; and because the lease in that case contained a clause of perpetual renewal, and in effect amounted to a sale, the court held it *ultra vires*. What practical difference is there between this and

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a lease with the same powers for 99 years? If that decision does no more, it at least leaves this court free to follow its own views of the powers conferred by the Indiana law in regard to this subject on its railroad corporations.

Lastly, it is said that in *Railroad v. Vance*, 96 U. S. 450, this court decided that this same contract was binding on the Indianapolis & St. Louis Co. That was done on the ground that the latter company was made a corporation of the State of Illinois by the act of that State of March 11, 1869, and was using that part of the present plaintiff's road lying within the State of Illinois under that contract. In reference to its liability to pay the taxes on that part of the plaintiff's road, it was held to be an Illinois corporation, and bound under the Illinois statute by the contract of lease now under consideration. But we have just shown that the Indianapolis & St. Louis Co. was an Indiana corporation when this contract of lease was made, which was two years before it became an Illinois corporation by the Act of 1869. The present suit is against it as an Indiana corporation; otherwise it could not be maintained. The validity of the contract depends on its power as an Indiana corporation to make it at the time it was made. It had none then, and no act of the Indiana legislature has ratified it since. That suit was founded on an Illinois contract between Illinois corporations to collect Illinois revenue, and was in no sense governed by Indiana law, but by the law of Illinois.

As regards this lease, in a suit against the Indiana corporation, organized under its laws by the name of the Indianapolis & St. Louis R. Co., in the circuit court of the United States for that district, we must hold it to be void for want of power in the defendant company to make it.

We have been thus careful in our examination into the power of the lessor and lessee companies in the contract of lease, because if the lease itself is void the contract of the other companies must be equally so. A contract to perform for the Indianapolis & St. Louis R. Co. obligations which it was forbidden to assume, and which it had no authority to assume, must itself be void. There is no power shown in any of these companies to accept a lease of the complainant such as the one in the present case, and perform its conditions, and they cannot, therefore, become parties to such a contract with a road outside the State which chartered them any more than the principal company. If these guarantying companies had executed the original contract of lease, it would have been void for want of authority from the legislature of Indiana, or of any other State by whose laws they are incorporated or endowed with corporate power. No such power is shown in them to lease roads beyond their own States. Indeed, while there may be a just claim of authority for some kind of running arrangement between two connecting roads under the Indiana statutes, there is no con-

nection between the plaintiff's road and any road of a guarantying company. The connection even by traffic is remote. These companies might as well have assumed the power to loan them money, or to indorse their notes, or any other commercial transaction, as to guaranty the performance of a void contract by one company to another.

It may not be amiss to cite one or two cases in which this power to guaranty the contract of one corporation by another is more directly in point. Among these are *Colman v. Eastern Cos. R. Co.*, 10 Beav. 1; *Madison, W. & M. Plank-road Co. v. Watertown & P. Plankroad Co.*, 7 Wis. 59.

In the first of these cases, under the powers contained in the acts of Parliament, the Eastern Counties R. Co. and the Eastern Union R. Co. had formed a railroad from London to Manningtree, a place about 10 miles from the port of Harwich. The directors of these companies conceived that it would add to the traffic and profits of the railway if a steam-packet company could be formed communicating between Harwich and the northern ports of Europe, and they accordingly took proceedings for the establishment of such a company. It was intended that the railway companies should guaranty to the shareholders in the steam-packet company a dividend of five per cent per annum upon their paid-up capital until the dissolution of that company, and that then the whole paid-up capital should be paid by the railway companies to the shareholders of the packet company in exchange for a transfer of its assets. On a bill by a shareholder of the railway company to enjoin, it was held by the master of the rolls, Lord Langdale, that no such contract was within the power of the railway companies, and further proceedings in the matter were enjoined. Among other things, that learned judge said that "if there is one thing more desirable than another, after providing for the safety of all persons travelling on railroads, it is this: that the property of the railway companies shall be itself safe; that a railway investment shall not be considered a wild speculation, exposing those engaged in it to all sorts of risks, whether they intended it or not. Considering the vast property which is now invested in railways, and how easily it is transferable, perhaps one of the best things that could happen would be that the investment should be of such a safe nature that prudent persons might without improper hazard invest their moneys in it. Quite sure I am that nothing of that kind can be approached if railway companies should be at liberty to pledge their funds in support of speculations not authorized by their legal powers, and which might very possibly, to say the least, lead to extraordinary losses on the part of the railway company." This became a leading case in England, where its doctrines have been

steadily followed. It is cited with approval in *Pearce v. Madison & Indianapolis R. Co.*, 21 How. 441.

In the case of *Madison Plank-road Co. v. Watertown Co.*, 7 Wis. 59, the former company, in order to aid the latter company to build a plank-road, which was a continuation of the road of the former, agreed to guaranty a loan made to the Watertown Co. After the road was built the Madison Co. refused to pay on the default of the Watertown Co. The supreme court held that the Madison Co. had no corporate power to guaranty the payment of the debt of the other company; and when pressed with the argument that, by the building of the road, the Madison Co. had received the benefit which had induced it to guaranty the debt, the court said it was a contract *ultra vires*, and could not be enforced.

We are of opinion that the guaranty of the obligations of the lease on the part of the Indianapolis & St. Louis Co. GUARANTIES HELD VOID. by the other defendants is void.

4. It is argued, in support of the decree, that, though the contract of lease may be void, so that no action could originally have been sustained upon it, there has been for 10 years such performance of it, in the use, possession, and control of plaintiff's road and its franchises, by the defendants, that PERFORMANCE UNDER A VOID LEASE. they cannot now be permitted to repudiate or abandon it; that it now presents one of a class of cases which hold that, where a void contract has been so far executed that property has passed under it, and rights have been acquired under it, the courts will not disturb the possession of such property, or compel restitution of money received under such a contract.

Undoubtedly there are such decisions of courts of high authority, and there is such a principle, very sound in its application to appropriate cases. But we understand the rule in such cases to stand upon the broad ground that the contract itself is void, and that neither what has been done under it, nor the action of the court, can infuse any vitality into it. Looking at the case as one where the parties have so far acted under such a contract that they cannot be restored to their original condition, the court inquires if relief can be given independently of the contract, or whether it will refuse to interfere as the matter stands. We know of no well-considered case where a corporation which is party to a continuing contract which it had no power to make, seeks to retract, and refuses to proceed further, it can be compelled to do so. As was said in *Thomas v. Railroad Co.* (a case so often in point here), "having entered into the agreement, it was the duty of the company to rescind or abandon it at the earliest moment. This duty was independent of the clause in the contract which gave them the right to do it. Though they delayed its performance for several years, it was nevertheless a rightful act when it was done.

Can this performance of a lawful duty,—a duty which it owed to the stockholders of the company and to the public,—give to plaintiffs a right of action? Can they found such a right on an agreement void for want of corporate authority, and forbidden by the policy of the law? To hold that they can, is, in our opinion, to hold that any act performed in execution of a void contract makes all its parts valid, and that the more that is done under a contract forbidden by law the stronger is the claim to its enforcement by the courts."

Whatever may be said in regard to the Indianapolis & St. Louis Co., there is wanting in the case of the guarantying companies one of the strongest reasons usually urged in support of the estoppel, as it is sometimes called, namely, that the recalcitrant party has received the money or the property of the other; for, so far from these guaranty companies having received of the plaintiffs any money or property, they are the parties who have been paying money, and the plaintiffs receiving it, for rent of its road. They are not, therefore, estopped on any principles of that doctrine from ceasing to pay money on an illegal contract because they have have heretofore done so. On the contrary, as we have already said, the duties of these directors to their stockholders is to cease to perform a contract to which they were never bound.

We do not decide the question whether the Indianapolis & St. Louis R. Co. cannot be compelled to pay the plaintiff for the use of its road, though the contract be void. Whether it would be so liable on a *quantum meruit* admits of doubt. It is unnecessary to decide this, because that company has submitted to the decree of the circuit court in favor of plaintiff for that rent by failing to give bond and perfect its appeal from that decree. That part of the decree must stand, as no appeal from it has been prosecuted.

The decree against the other defendants, appellants here, is for the reasons given reversed, and the case remanded to the circuit court, with directions to dismiss the bill as to them.

BRADLEY, J., (dissenting).—I dissent from the judgment of the court in this case, and will very briefly state my reasons for dissenting. The St. Louis, Alton & Terre Haute R. Co., the lessor, had full authority to make the lease of its road and works which is brought in question in the cause. The Indianapolis & St. Louis R. Co., the lessee, assumed to have power to take the lease, and had such power in Illinois by the effect of the laws of that State, and was supported in its assumption of power by the implications of several statutes of Indiana. If these implications were not sufficiently strong to amount to a grant of power, still they were sufficient to show that the legislature of Indiana understood the power as existing, and acquiesced in it.

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TO
MAKE LEASE.

The other railroad companies, parties to the suit, who guarantied the performance of the lease and its covenants on the part of the lessor, had the power to do so by the laws of Illinois, and the engagement of guaranty on their part was a contract entered into by them in furtherance of their through business to and from St. Louis and the States west of the Mississippi. The whole arrangement, in fact, was devised by them for the purpose of facilitating and increasing their business as integral parts of great trunk lines, which, in the absence of interstate regulations of commerce made by Congress, are of the greatest utility to the business of the country.

To hold that the railroad companies of the country thus situated cannot, without acting *ultra vires*, make business arrangements beyond the limits of their own tracks, in a country situated and divided up into States as ours is, it seems to me is to ^{ACTS NOT ULTRA VIRES.} take a very contracted view of the powers and duties of these public institutions. According to the doctrine of the court, a New York or Pennsylvania company could not even have a ticket or freight agent in St. Louis for the purpose of soliciting freight and passengers to be carried on the trunk line of which it forms a part. They could not hire an office for such an agent, or, if they did, they could not be held responsible for the rent. This is carrying the doctrine of *ultra vires* to what seems to me an absurd extent. It is following out the English notions on that subject, which always seemed to me inapplicable to our situation and circumstances, however well suited to that compact and homogeneous country,—homogeneous in government and jurisdiction. All the principal railroads in England extend across the entire country from London, in different directions, to the sea. In this country, as Congress declines to charter through lines across the States, the State governments themselves charter local roads, limited by the boundary lines of the State. In order to give the country through facilities at all, these State roads are obliged to unite their lines, and make what is called a trunk line. The necessities of the country require it. Yet, according to the logic of the decision in this case, this is all *ultra vires*. Look at it. One of our great trunk lines, extending from west to east, is composed (say) of five connected railroads, forming together a continuous line,—working together under a contract which regulates their mutual rights and obligations in the management of the business and the distribution of its joint receipts. All this is *ultra vires* and void. One of the links of the chain is a ferry, which, in consideration of extra accommodations afforded for the business of the line, is guarantied a certain sum per annum. The guaranty is *ultra vires* and void. Is this law? It may be English law; but is it American law? I cannot believe it. We must not shut our eyes to the fact that new circumstances and conditions, of themselves, require and produce a modification of old rules, or the application of new ones.

This narrow doctrine has already been discarded by the courts, and by this court. It has become settled law that a railroad company at one end of a trunk line may enter into contracts for the transportation of passengers and goods to any part of the line, hundreds of miles beyond its own track, and will be held liable for the fulfillment of such contracts; and yet, according to the doctrine of the opinion in this case, this is *ultra vires*. But this is not all. The contract has been performed on the part of the lessor company, and the lessee and its guarantors have enjoyed the benefits of it. With what face can they now refuse to pay what they agreed to pay? With what face can they plead incapacity to contract? This is not a suit to compel the specific performance of the contract in future; but to compel the payment of the money earned by past performance of the contract. It seems to me that the companies concerned are estopped to deny their liability to make this payment. It is the companies themselves who make the plea, not their stockholders.

In several national bank cases, where the banks have loaned money on mortgages of land, contrary to the express prohibition of the act of Congress, and *ultra vires*, we have enforced the contract, leaving it to the government to call the banks to account for acting outside of their chartered powers. Why should not the same rule be applied to railroads, if it is thought they have exceeded their powers? especially when no stockholder complains of the company's action, and the object of the suit is to compel them to pay for a benefit actually received.

In every aspect in which the case can be viewed, it seems to me that the decree of the circuit court was not only just and right, but in accordance with sound principles of American law, and ought to be affirmed.

I am authorized to say that Mr. Justice HARLAN agrees with me in opinion.

Traffic Agreement construed with Reference to Repayment of Money advanced.—The Northern Transportation Co. ran a line of steamboats from the upper lakes to Ogdensburgh, N. Y., connecting at that point with the Ogdensburgh & Lake Champlain Railroad running to Plattsburgh on Lake Champlain, from which point traffic was sent to Boston, Portland, and other seaports *via* the Vermont & Canada Railroad, the Vermont Central Railroad, the Northern Railroad, the Concord Railroad, the Nashua & Lowell Railroad, and the Boston & Lowell Railroad. The Northern Transportation Co. was financially embarrassed. At the same time, it was desirable that the company should be continued in existence, and if possible under the control of the railroad companies named above, so that the large traffic brought by the steamboat company to Ogdensburgh would be shipped over the roads named to its destination. In order to secure control of the transportation company and its traffic, it was determined to advance for the use of that company about \$600,000. And the method of such advancement was as follows: Two trustees were created. To these trustees the Ogdensburgh company advanced the sum named, \$600,000; and the trustees applied it to the use of the transportation company. A con-

tract was made providing for the repayment to the Ogdensburgh company of this \$600,000 by the companies owning the roads east of Plattsburgh, these companies being most benefited by the traffic secured from the transportation. One of these companies, the Nashua & Lowell, failed to repay to the Ogdensburgh company its share of the \$600,000 advanced, and the Ogdensburgh company thereupon brought suit against the Nashua & Lowell Co. to recover this sum. The question presented in the litigation was whether the Ogdensburgh company could recover of the Nashua & Lowell Co. its share of the \$600,000 advanced by the Ogdensburgh company for the benefit of the other companies; and this question was determined by the court's construction of the contract made by the parties, which, so far as material to this question, was as follows:

"Articles of agreement between the Northern Transportation Co. of Ohio, a corporation established under the laws of Ohio, party of the first part; J. Gregory Smith, of St. Albans, Vermont, and George Stark, of Nashua, New Hampshire, parties of the second part; and the trustees and managers of the Vermont Central and Vermont & Canada railroad companies, the Northern R. of New Hampshire (the Concord R. Corporation of New Hampshire, provided they execute this agreement), the Nashua & Lowell R. Corporation of New Hampshire and Massachusetts, and the Boston & Lowell R. Corporation of Massachusetts, parties of the third part; and the Ogdensburgh & Lake Champlain R. Co., the party of the fourth part.

"Whereas, the above-named railroad companies, and trustees and managers, which have become parties to agreements hereto annexed, bearing date the twenty-fourth day of February, A.D. 1870, and whose tracks form a large part of the connecting line between Boston, Massachusetts, and Ogdensburgh, in New York, depend largely for their business upon the regular transportation, by steamers, of freight and passengers between said Ogdensburgh and the western cities and towns upon the great lakes; and whereas, the party of the first part was chartered to carry on the business of such transportation, but by reason of financial embarrassments is unable to carry it on efficiently, and it is feared that its steamers may be taken from this line; and whereas, the parties of the third part and the party of the fourth part believe it to be for their and the public interest to advance or lend to the parties of the second part some portion of the gross receipts for the transportation of freight and passengers to be brought to and from their line by the steamers of the party of the first part, in order to secure the most regular, efficient, and permanent service by steamers between Ogdensburgh and said western cities and towns for the term of nineteen years from the first day of March, A.D. 1871; and whereas, the parties of the second part have agreed to use all sums advanced or lent to them to secure the ownership or the control of the stock of said party of the first part, and otherwise to secure the most efficient management of its business to carry out the purposes of this agreement, and for no other purposes, and to hold all said stock which they may hold or control, and all other property or rights which they may purchase or otherwise acquire with said funds, except debts due from said party of the first part, in trust to secure the repayment of all sums which may be so advanced or lent, as aforesaid, with interest, as hereinafter provided: . . .

"Article First. This article in substance provided that the transportation company should maintain its line of steamers and send its traffic going east of Ogdensburgh over the lines of railway owned by the companies who were parties to the agreement.

"Article Second. That the parties of the third part will, during said term, semi-annually reserve out of the gross receipts, either upon said line or upon any road now leased or operated, or which may hereafter be leased or operated by the parties of the third part, or either of them, for the transportation of

freight and passengers brought to said line at Ogdensburgh by the steamers of the party of the first part, the sum of \$150,000, or so much thereof as shall be adequate for the purposes herein set forth, and pay over the same to the parties of the second part to be used for the purpose of securing regular, efficient, and adequate transportation to and from said Ogdensburgh as aforesaid; and the party of the fourth part will, in case it shall be necessary to secure the regular and efficient running of said steamers to and from said Ogdensburgh, when called upon by parties of the second part, advance from time to time sums not in all exceeding \$800,000, to be used by said parties of the second part for the same purposes as said semi-annual payments, and to be *pro tanto* in lieu thereof, and to be repaid out of said semi-annual reservation as hereinafter provided, it being understood and agreed that each of said parties of the third part shall only be liable to reserve or advance or pay to the parties of the second part, or to the party of the fourth part, as the case may be, its share of such reservation, advance, or payment, to be ascertained by the proportion which said gross receipts of each of said parties bear to the entire amount of said gross receipts between Ogdensburgh and points eastward, upon the roads owned, leased, or operated by any of said third parties.

"Article Third provided for the trustees holding any stock or bonds of the transportation company which they might acquire with the \$600,000 and for the sale of such securities to reimburse the company advancing the \$600,000.

"Article Fourth provided who should be successor in trust of the trustees in case of a vacancy occurring; and further, as to the application by such trustees of the securities held by them.

"Article Fifth. That in case the party of the fourth part shall advance any sum or sums amounting to \$600,000, or any part thereof, under this agreement, then the parties of the third part are to pay to the party of the fourth part so much of said semi-annual payments reserved from gross receipts, as aforesaid, as will pay the semi-annual interest on said sum or sums so advanced by the party of the fourth part at the rate of 8 per cent per annum, and shall pay to the persons who may for the time being hold the offices of president and treasurer of the Boston & Lowell R. Corporation, and of the Ogdensburgh & Lake Champlain R. Co., as trustees, such sums semi-annually as will, in the judgment from time to time of said two presidents and treasurers for the time being, when invested as a sinking fund, pay all excess of the advances of the party of the fourth part over \$500,000 within two years from the date hereof, and the remainder of the principal of said advances on or before the expiration of said term of nineteen years, and also such further sum semi-annually as will, when invested as a sinking fund, in the judgment of said two presidents and treasurers as aforesaid, purchase the existing mortgage-bonds of the party of the first part, amounting to \$400,000, within ten years from the date hereof, which bonds so purchased shall be held by said trustees of the sinking fund for the security of the parties hereto, as if held under article seventh of this agreement, and that said semi-annual payments are to be made to the party of the fourth part and to said trustees of said sinking fund in place of advances to the same amounts to the parties of the second part, as hereinbefore provided, and are to be ultimately repaid to the parties of the third part out of the dividends, income, and securities purchased or otherwise acquired by the parties of the second part, as herein provided, whether the same shall be held by them or transferred to the trustees of said sinking fund. In no case shall payments to a sinking fund be less than amounts which invested at six per cent per annum will produce the sum to be paid out of such sinking fund."

Articles sixth, seventh, eighth, and ninth contained other provisions not material to the question before the court.

It was held that under this contract the advance of \$600,000 made by

the Ogdensburgh company was intended to be paid back by the several other companies only through their receipts from the traffic coming to them from the transportation company over the Ogdensburgh & Lake Champlain R. Miller, J., said:

"The Ogdensburgh road advanced the \$600,000, and it was used for the purpose mentioned in the agreement. The transportation company became bankrupt in the year 1874, the business was broken up, and has never been resumed under the contract. A part of the money advanced by the Ogdensburgh company has been paid to it. It made settlements with some of the companies, or their trustees, in regard to its claim, and it brought this suit against the Nashua & Lowell Co. for what it alleges to be its proportion of the sum unpaid. It is not asserted by the plaintiff that the parties who are described in the agreement as the parties of the third part are jointly liable for this deficiency. If so, no suit could be maintained against the defendant here without joining the others. It is not asserted that there are any words of express promise to pay by either of those companies the whole or any definite part of this \$600,000. The argument of counsel is that there arises an implied promise out of the nature of the transaction. We have looked in vain for anything in the language of the agreement which requires or justifies such an implication. If there were in the agreement any words which showed that the party of the third part had borrowed this money from the party of the fourth part, or that the latter had loaned it to the former, the argument would be of weight. But the language of article 2, which relates to this part of the transaction, is that 'the party of the fourth part will, in case it shall be necessary to secure the regular and efficient running of said steamers to and from Ogdensburgh, when called on by the parties of the second part, advance, from time to time, sums not exceeding in all six hundred thousand dollars, to be used by said parties of the second part for the same purposes as said semi-annual payments, and to be *pro tanto* in lieu thereof, and to be repaid out of said semi-annual reservations as hereinafter prescribed, it being understood and agreed that each of said parties of the third part shall only be liable to reserve and advance or pay to the parties of the second part or to the party of the fourth part, as the case may be, its share of such reservation, advance, or payment, to be ascertained by the proportion which said gross receipts of each of said parties bear to the entire amount of said gross receipts between Ogdensburgh and points eastward, upon roads owned, leased, or operated by any of said third parties.'

"It is to be observed, in the first place, that the transaction is here called an advance, and not a loan; and, secondly, that the advance is made to the party of the second part, and not to the party of the third part. This party of the second part was J. Gregory Smith and George Stark, who were made trustees to receive this money, and see to its investment in securing the service of the transportation company, and who were to receive and refund to the Ogdensburgh company, for this advance, a certain proportion of the gross receipts of the railroad companies constituting the party of the third part, which was relied on to repay that company in full. This same article, in the very sentence in which the Ogdensburgh company agrees to advance the money to Smith and Stark, declares that each of the parties of the third part shall only be liable to reserve and advance or pay to the parties of the second part, or to the parties of the fourth part, its share of such reservation, to be ascertained by its proportion of said gross receipts. It is here also said that this advance is to be repaid out of said semi-annual reservation as hereinafter provided. We thus see, in this single article, that the money is to be advanced to the trustees, what use is to be made of it, that it is to be repaid out of a fund called the semi-annual reservation to be afterwards provided, and that neither to the trustees nor to the Ogdensburgh company are the parties comprising the third part to become liable beyond its share of

this reservation. This reservation is described in the same article of the agreement as a semi-annual sum not exceeding \$150,000, or so much as may be adequate for the purposes herein set forth, 'out of the gross receipts either upon said line or upon any roads now leased or operated by the parties of the third part, or either of them, for transportation of freight and passengers brought to said line at Ogdensburg by the steamers of the party of the first part.' By article 4 these trustees are required to hold all the stock of the transportation company which they now have or may acquire, and all other property or rights which they may acquire under this agreement, to secure the repayment of the sums advanced by the Ogdensburg company and by the parties of the third part, with interest thereon at 10 per cent per annum. Article 5 makes a further provision for payment, out of this reservation from the gross receipts of the semi-annual interests of this advance by the Ogdensburg company, and for a sinking fund to pay all in excess of the loan over \$500,000, within two years, and the remainder within the nineteen years the contract had to run. It will be observed that this agreement was intended to expire at the same time that the lease of the Ogdensburg road expired. In all this it will be perceived that, while the mode of the repayment of the advance of \$600,000 is carefully and repeatedly stated, and the security provided, it is nowhere hinted that the railroad companies of the third part are to be liable for it if these sources of payment fail. Indeed, the third article provides for security for advances which they may make in the same terms that it provides for the party of the fourth part, which is the Ogdensburg company; and the language we have cited from article second, that each of the parties of the third part is liable only on this account for its proportionate reservation from the proceeds of traffic derived from the Ogdensburg road, leaves little room for further doubt that these resources were alone bound for the repayment of this advance.

"The learned counsel for appellant makes a forcible argument against this view, based on the assumption that the Ogdensburg company had no interest in the traffic of the roads embraced in this agreement, because, its road being leased for a period coincident with that of its contract, the lessees received all its benefits and the company none. It must be confessed that if the Ogdensburg company had no other interest in the transaction than to secure the repayment of a loan of money and the interest on it, as if made by any other capitalist, the suggestion would be entitled to much weight; but in this assumption counsel is in error. The preamble recites, as one of the main inducements to making the agreement, that 'by reason of financial embarrassments the transportation company will be unable to continue its business, and its steamers will be withdrawn; and whereas, parties of the third part and the party of the fourth part (the Ogdensburg company) believe it to be for their interest and the public interest to advance,' etc. The interest of the Ogdensburg company is here clearly stated as the cause of its advance of the money, though at the time the agreement was executed its road had already been leased a year, and the fact of the lease is recited in the agreement. Though this lease was for a fixed annual rent, the lessees were the trustees of two other railroad companies which were insolvent, and these trustees could only rely on the profits or receipts arising from this road to enable them to pay the rent. Indeed, so well founded was the apprehension of failure of rent arising from this fact, that in a few weeks after the withdrawal of the boats of the Northern Transportation Co. the lease was rescinded, the road restored to the company, and the trustees of the two Vermont railroad companies released from any further liability on the contract we are now trying to construe. It is reasonably certain that the Ogdensburg Railroad Corporation had a deep interest in the success of the enterprise inaugurated by this contract, and probably a larger interest than any other party to the

agreement, and clearly saw that it must make this advance, the only thing it did in the matter, at the risk of the success of the adventure, with such security for obtaining a return out of the proceeds of it as the contract gave. A stipulation of the parties was made on submitting the case to the court below, that, if that court held that no liability under the contract attached beyond that for a proportion of the gross receipts, there were no such receipts in defendant's hands, and the bill should be dismissed without requiring an accounting.

"The circuit court construed the contract as we do, and its decree dismissing the bill is therefore affirmed."

GREGORY *et al.*

v.

NEW YORK, LAKE ERIE AND WESTERN R. Co. *et al.*

(40 *New Jersey Equity*, 38.)

In a suit brought by stockholders of a foreign corporation against that corporation and another corporation to which it had leased its roads, lands, etc., all of which are out of this jurisdiction, seeking relief in regard to the transactions of those corporations with each other, the court, on demurrer, declined to take jurisdiction, on the ground that the courts of New York were the proper forum for the litigation.

BILL for relief. On general demurrer to bill.

Mr. C. Parker for demurrant.

Mr. J. B. Vredenburg for complainants.

THE CHANCELLOR.—The bill is filed by the executors of Dudley S. Gregory, deceased, late of Hudson county, in this State, stockholders of the Buffalo, Bradford & Pittsburgh R. Co., a corporation of the States of New York and FACTS. Pennsylvania, in behalf of themselves and all other stockholders who shall come in and seek relief by and contribute to the expense of the suit against the New York, Lake Erie & Western R. Co., Hugh J. Jewett, president, and Stephen Little, auditor of that company, and against the Buffalo, Bradford & Pittsburgh R. Co. It states that the complainants' testator was, at his death, the owner of five hundred and sixty-four shares of the stock of the last-mentioned company, of the par value of \$100 per share; that the amount of the capital stock of the company is now \$2,286,000, divided into two thousand two hundred and eighty-six shares of \$100 each; that on the 5th of January, 1866, the company leased to the Erie R. Co., and its successors and assigns, for four hundred and ninety-nine years, its railroad, etc., etc., and all its lands, including its mineral or coal lands; excepting and reserving, however, to the lessor, any and all oil underlying the demised premises, or any

part thereof, with the right to the lessor and its successors or assigns to enter upon the premises, or any part thereof, to excavate and bore for oil, etc., etc.; that, in consideration of the demise, the Erie Co. assumed and agreed to pay certain taxes and the principal and interest of two thousand bonds of \$1000 each, made by the lessor, and secured by its mortgage of its property; that, under the lease, the Erie Co. at once entered into possession, and it, and its successors and assigns, have remained in possession from the date of the lease, January 5th, 1866, to this time; that the defendant, the New York, Lake Erie & Western R. Co., is its successor and assignee, and, as such, is in possession of the demised premises under and by virtue of the lease, and has been so since June 1st, 1878; that the last-mentioned company is the owner of a majority of the capital stock of the Buffalo, Bradford & Pittsburgh R. Co., and, by reason of such ownership, has elected all the officers of that company, and has obtained, and has had, for many years, complete control of it; that a part of the demised premises consists of large tracts of unimproved lands in McKean county, Pennsylvania; that in 1875 it was discovered that those lands were underlaid with oil in immense quantities; that in 1878 the officers of the New York, Lake Erie & Western R. Co. reported to its stockholders that the company had received for royalties for oil taken from those lands during the year ending September 30th, 1878, \$999.81; and the bill further states that that company has, ever since that year, made large sums of money for such royalties, and for transporting the oil, but that since that time no separate report has been made by it to its stockholders, or to the Buffalo, Bradford & Pittsburgh R. Co., of the moneys received from the oil royalties, oil contracts, and oil sold and transported from the demised premises, and that neither company has made any report thereof to any of the stockholders of the latter company; that the complainants have frequently demanded an account from the latter company of the moneys received by the former company for those oil royalties, oil contracts, and oil sold and transported from the demised premises, but it has refused to give the account, referring them to the other company, alleging that the latter would neither pay nor account for the money; that then the complainants applied to Stephen Little, the auditor of the Erie Co., for an account, who stated that his company had received money for oil taken from the demised premises, and that he could give an account of it, but had been instructed by Hugh J. Jewett, president of his company, not to do so without his permission, and added that if the complainants would get Mr. Jewett's permission for him to do so, he would make up the account; that the complainants then called upon Mr. Jewett, with a view to obtaining such permission, but he, after he ascertained their business, declined to see them, saying that he was too busy; that they after-

warus called on him, but with like result, and that they tried to get the permission from him through the treasurer of his company, but were unsuccessful, and the auditor refused to give the account to them or their company without the permission; that after waiting a reasonable time for some action to be taken by the Erie Co. in accordance with their request, and after calling on their own company and demanding that it should take some proceedings to compel the former company to account, but all in vain, they, on the 3d of March, 1884, served a written demand on their company, requiring it to demand such account, and, in case it was denied, to sue for it and the money due, but their company disregarded the demand, and the other company continues to take the oil from the demised premises, and convert it to its own use. The bill further states that the Erie Co., by means of its ownership of a large majority of the capital stock of the complainants' company, has installed its agents as officers of the latter company, and that those officers are acting in the interest of the Erie Co., and against the interests of the complainants, who are not interested in the latter company, in their refusal to institute proceedings to obtain the desired account, and that they are so managing the complainants' company as to make it subservient to the interests of the Erie Co., and to make the oil in question the property of the latter, and so to defraud the complainants out of their share of the moneys realized from it, and thus render their stock worthless, so that the Erie Co. may avail itself of its value without compensation, and that the refusal of the Erie Co. to account, and the refusal of the other company to compel it to do so, are in furtherance of that unlawful scheme and purpose; that in pursuance of that scheme the capital stock of the complainants' company was, after the lease, increased from eleven thousand shares, at \$100 each (\$1,100,000, of which the complainants owned five hundred and sixty-four shares), to twenty-two thousand eight hundred and sixty shares, at \$100 each (\$2,286,000), and that the increased or additional stock was issued to the Erie Co. for the bonds of the other company, the principal and interest of which the former was, by the terms of the lease, bound to pay in consideration of the lease; and that when, in 1878, a small dividend was paid to the complainants for oil royalties, they received, instead of five hundred and sixty-four eleven thousandths of the sum divided, only five hundred and sixty-four ninety-two thousand eight hundred and sixtieths of the sum, and the complainants insist that the issuing of the additional stock in consideration of the bonds, as before mentioned, gives the holder, the Erie Co., no right to share in the oil underlying the demised premises, and that the complainants are therefore entitled to have the Erie Co. return to the other company the dividend received by it from the oil royalties just mentioned, and that the complainants are entitled to have their own company pay to

them their share of that money ; and they also insist that they are entitled to receive the proportion of five hundred and sixty-four eleven thousandths of any money due from the Erie Co. to the other company for oil reserved taken by it. The bill prays discovery, and that the Erie Co. may account with the complainants and the other stockholders of the Buffalo, Bradford & Pittsburgh R. Co. who may come in as parties, and that it may pay to them their proportion of the amount due by it to the complainants for oil royalties, oil contracts, and oil transported from June 1st, 1878, to this time, or that it may account with the other company for that oil, and may pay to it the amount due, and that that company may pay to the complainants and the other stockholders who may come in what they may be entitled to as such stockholders ; and that it may be decreed that the Erie Co., as owners of the stock issued for bonds, shall not be entitled to share in that money, and may be compelled to pay back to the other company any of the money which it has received or retained by reason of its ownership of that stock, and that on its failure to pay it the lease may be declared forfeited. The demurrer is filed by the Erie Co.

It appears by the bill that the Buffalo, Bradford & Pittsburgh R. Co. is a foreign corporation. An important part of the relief sought is a decree that the holder or holders of certain stock issued by it to the Erie Co. are not entitled to dividends paid out of the property of the former, because that stock was illegally and fraudulently issued. It is quite manifest that this is not the proper forum for the trial of the question whether that stock was properly issued or not. If the decree should be against the validity of the stock, how is this court to enforce it as against the Buffalo, Bradford & Pittsburgh R. Co. ? It is almost too obvious for remark that this court cannot regulate the internal affairs of foreign corporations, nor can it enforce its decrees out of this State.

But again, if relief be granted in this case, the decree must order that the money recovered be paid over to the Buffalo, Bradford & Pittsburgh R. Co., to be administered by its board of directors. *Chester v. Halliard*, 7 Stew. Eq. 341 ; s. c. on appeal, 9 Stew. Eq. 313. But that company is a foreign corporation, and it may not appear in this suit ; and if the Erie Co. should be ordered to pay the money over to it, how can this court secure the distribution of it among the stockholders of the latter company, that company being out of the jurisdiction ?

The ground of complaint is that the Erie Co. has committed trespass on the property of the complainants' company, in Pennsylvania, and has itself taken oil from it for its own benefit, or has, for its own benefit, given leave to others to do so, and that it has fraudulently obtained control of the complainants' company by a fraudulent issue of stock to itself, and

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TION.

has thus protected itself against being called to account for the oil which it has unlawfully taken and converted to its own use. The cause of action did not arise in this State, but in Pennsylvania. The suit is, in fact, a suit for damages for trespasses done there. The complainants seek to distribute those damages, when recovered, among the stockholders of the Buffalo, Bradford & Pittsburgh R. Co., excluding the holder or holders of the stock issued to the Erie Co. But this court cannot compel the former company even to receive the money, and, of course, cannot compel it to administer it. The whole matter is appropriate to the tribunals of the State of New York, and not to those of this state. The sole ground of the claim of jurisdiction must be that the complainants are citizens of this State, and that it does not appear that the Erie Co. is a foreign corporation. But the considerations before presented are conclusive against retaining the bill. In *Howell v. Chicago & Northwestern R. Co.*, 51 Barb. 378, 385, the supreme court of New York said that while it did not mean to be understood as saying that in no cases should the courts of that State exercise jurisdiction in reference to the affairs of foreign corporations, yet that even if the power existed to compel a foreign corporation to come into the court and become a party to a litigation there, still, where the cause of action arose abroad, where it affected only the internal government of the corporation, where the judgment, if rendered, could not be in any way enforced against the corporation, except by injunction against individual members of it, and the party had an ample remedy in the State where the corporation had a legal existence, the courts of New York might well decline to exercise an equitable jurisdiction. And in *Cumberland Coal Co. v. Hoffman Coal Co.*, 30 Barb. 159, 171, it was said that to warrant proceedings against foreign corporations, there must be either a necessity or a fitness suggested by the peculiar circumstances. In the case in hand, the courts of New York are the proper forum for this litigation, and this court ought to decline to exercise jurisdiction. The demurrer will be allowed.

COURTS OF NEW
YORK THE
PROPER FORUM.

SANDY RIVER R. Co.

v.

STURBS.

(*Advance Case, Maine. December 14, 1895.*)

The directors of the plaintiff corporation, before building its road, were desirous of locating its route over a particular portion of the land of A., provided A. would give the right of way. This he refused to do, and the di-

rectors thereupon abandoned this route, and decided upon another. The defendant, who was also a director, without any suggestion from his associates, immediately purchased of A. the land in question, embracing a much larger track than the corporation required for its purposes, paying \$500 therefor, and at once reported the result of his negotiation to the board of directors, and stated that he could now accommodate them with a right of way, and as much land as they might need for railroad purposes. But they expressly repudiated all participation in defendant's purchase, holding that it was made upon his individual responsibility, and not in behalf of the corporation, to which he assented. The defendant paid the consideration, took the deed in his own name, and placed it on record. Subsequently the road was located across this land, and a station and water-tanks erected thereon. Difficulties arose between the plaintiff and defendant as to the land damages, which two committees of conference were unable to settle, because the defendant would not convey a fee instead of the use of the land, and finally, three and a half years after the purchase by the defendant, the plaintiff, for the first time, claimed that defendant held the whole land in trust for the corporation, and brought this bill in equity to enforce a conveyance to itself. *Held*, that though a director is in equity a *quasi* trustee, and therefore his dealings with respect to matters involved in the trust are jealously scanned by the court, yet the acts of the defendant in this case were of such a frank, open, and *bona-fide* character, and so consistent with the interests of the *cestui que trust*, that the bill cannot be sustained.

ON appeal by plaintiff. This was a bill in equity to compel the conveyance to itself of certain land purchased by the defendant, while a director of the plaintiff corporation, and claimed to be held by defendant in trust. It was heard by the presiding judge at *nisi prius* on bill, answer, and proof, and was dismissed.

S. Clifford Belcher for plaintiff.

J. P. Swasey for defendant.

VIRGIN, J.—The complainant brings up this case by appeal from the decree of the presiding justice, who heard it on bill, answer, and proof. Its claim, briefly stated, is that the defendant, as one *FACTA* of its directors, and for its benefit, purchased certain land in the village of Strong, but took the conveyance to himself; that the company soon afterwards located its track, erected its station-house, water-tank, and wood-shed upon a portion of it; that the defendant holds the title to the whole land thus purchased in trust for the complainant; wherefore it prays that, on payment to him of the consideration, interest, and expenses, he be decreed to convey to the company. The defendant denies that he acted as director *in hac re*, and claims that the company being unable to obtain from the owner a right of way across the land upon the terms it proposed, he thereupon, without its direction, suggestion, or knowledge, purchased, on his own personal responsibility, from the owner much more land than was necessary for the company's use, to the end that it might have so much of it as was necessary for railroad purposes, for a reasonable consideration, or for such a proportion of the whole consideration as the portion of the land

needed and taken by the company should bear to the whole land. Several of the allegations in the bill are not proved in the sense in which they are set out, and some of them, especially in paragraphs 4 and 9, are disproved; and without unprofitably extending this opinion by analysis of the testimony, it is sufficient to say that the material facts, established by a fair preponderance of it, are these:

The company was organized in April, 1879. Prior to the following August it obtained by parol right of way 20 feet in width, not including any land for its buildings, and located its track across land of one Porter, in the village of Strong. Some of its citizens, and two directors, including the defendant, resident therein, expressed some dissatisfaction thereto, preferring a route further east, and nearer to the business centre of the village. Wherefore, at the latter date mentioned, five of the seven directors, together with Porter, assembled at the defendant's office to consider the proposed change of location, which, if made, would also cross the land of Porter. A majority of the directors not residing in Strong, being at least indifferent to the change, strenuously contended that it ought not to be made unless Porter would give this right of way, land damages for railroad buildings being inevitable on either route. But after a whole afternoon's importunate urging, he absolutely refused to accede and the projected change was therefore substantially abandoned. Thereupon the defendant took Porter out upon the land, pointed out the probable proposed route, and there made renewed but fruitless efforts to persuade him to give the right of way. Then the defendant proposed to personally purchase his entire field, which proposition Porter peremptorily declined to entertain. As the last resort, the defendant staked out some two and one half acres of it, comprising much more land than they anticipated the company might need for all its purposes, but across which the new track might probably go, and, after considerable bantering, Porter agreed to take \$500 therefor, provided the defendant would erect and maintain a fence against the remainder of the lot and the defendant closed the trade. Whereupon they returned to the office, where the defendant made a detailed report of his negotiations with Porter, adding, in substance, that, having purchased the land, he could accommodate the company with a right of way; and with as much land as was necessary, if they wished to locate there. But the directors expressly repudiated all participation in the defendant's purchase, alleging, among other reasons, that land there was not worth any such price, and declaring that he must understand that it was his own personal trade, to which he readily and expressly assented, whereupon they separated. A few days thereafter the defendant paid Porter the \$500, received his deed containing the fencing clause, and caused it to be recorded, and subsequently built the fence. There was no other

consideration for the land thus conveyed. In September the location was changed. In November and December the station-house and water-tank were erected, followed by the running of trains, and the erection of the wood-shed. Subsequently the parties had several conferences in relation to settling the damages for the land taken for the track and buildings. Still later, two committees were chosen for the same purpose. They staked out so much of the land as was deemed necessary for railroad purposes, agreed upon the price, but failed to conclude a final adjustment, because the defendant declined to convey the fee instead of the use of the land so long as it should be used for railroad purposes. Thus the matter stood until February, 1883, when the defendant, for the first time during the three and one half years of his ownership of the land, received notice that the company claimed he held the whole land in trust simply. He had held the office of director and clerk of the company from the time of its organization to November, 1883, attended its meetings, and never before received any intimation of such a claim.

Without questioning the rule so clearly recognized in this court, (European & N. A. R. Co. v. Poor, 59 Me. 277), as well as in many others, that his directorship constituted the defendant in law an agent, and in equity a *quasi* trustee at least, and thereby established his fiduciary character; fully appreciating the foundation of the important doctrine by which equity requires that the confidence imposed in a trustee shall not be abused for his personal interests; keeping constantly in mind the jealousy with which courts scan the dealings of a trustee with respect to matters involved in the trust; holding with other courts the *cestui que trust's* right of avoidance does not necessarily depend upon the fraud or *bona fides* of the trustee (Duncomb v. New York, H. & N. R. Co., 84 N. Y. 199; s. c., 4 Am. & Eng. R. R. Cas. 293), still we are of opinion that none of the cases, or the principles announced therein, invoked by the complainant, nor any of the numerous others upon the subject which we have carefully examined, would warrant us in granting the prayer of the complainant.

The defendant zealously worked for the interests of his principal by seeking to change the location, so as thereby to accommodate the business interests of the community in which one of its intermediate stations was to be located. This result had failed to be brought about by the other directors. As a last resort, he personally purchased what was then considered two or three times more land than he deemed the needs of the road required for public use, not as a speculation from which he might derive secret profits (Thomp. Liab. Off. 360, § 8, and cases in notes), but to facilitate the desired object. He did not deal with the company's funds, but paid his own without any assurance

DIRECTOR AN
AGENT IN LAW
AND TRUSTEE IN
EQUITY.

DEFENDANT'S
ACTS HONOR-
ABLE.

or intimation that the company would ever take any of the land. He did not deal with the company's property. He did nothing which he concealed from its knowledge, but frankly and promptly disclosed the whole transaction, and put his deed upon the public registry, and his acts were repudiated. He did not act in the premises in anywise inconsistent with the interests of his *cestui que trust*, nor acquire for himself any interest adverse to his company in any sense contemplated by the rules of equity governing trustees and *cestuis que trustent*. *McClanahan v. Henderson*, 12 Amer. Dec. 412; *Van Epps v. Van Epps*, 9 Paige, 238, 241.

There was no opportunity for a breach of trust; the defendant, standing alone against the other six directors, who had a full knowledge of all the facts, with full control of the question of change of location. If they concluded to make the change, the company could only "take and hold the land for public use." Rev. St. c. 54, § 14. It had no right to insist upon having the fee. If the parties could not agree upon the land damages, the statute furnished a tribunal to adjust that question. Rev. St. 1871, c. 51, § 6. If they could not agree as to the "necessity or extent of the land taken," their remedy was plain and adequate. Rev. St. 1871, c. 51, § 13.

But the alleged necessity for the whole land was evidently an afterthought on the part of the complainant. Its whole conduct, down to February, 1883, points in that direction. The staking out of the land appropriated, leaving a portion as not needed, the agreed price, based upon a fair proportion of the whole consideration paid by the defendant; the three reports of outstanding liabilities for land damages, including the defendant's claim; and the long (more than three and one half years) acquiescence of the company,—all afford ample proof that the company then took a new departure. Decree affirmed. Bill dismissed with costs.

PETERS, C. J., WALTON, LIBBEY, FOSTER, and HASKELL, JJ., concurred.

WOOD

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Advance Case, Iowa. April 7, 1886.*)

Where a station agent has power from his principal to contract for the shipment of freight or produce, he has also power to contract for the performance of whatever is reasonably necessary to be done to protect the merchandise or produce from injury, unless restricted by special instructions.

Where a railroad places an agent in charge of its business at a station, and empowers him to contract for the shipment of produce and freight, it holds him out as possessing the authority to contract with reference to all the necessary and ordinary details of the business; and within the range of such business he is a general agent. *Wood v. Chicago, M. & St. P. R. Co.*, 59 Iowa, 196; s. c., 21 Am. & Eng. R. R. Cas. 86, overruled.

Where a railroad company, by its local agent, contracts to ship potatoes from a given point, at a given date, and fails to do so for a reasonable time thereafter, and by reason of such delay the potatoes are frozen, the company will be liable in damages.

APPEAL from Delaware district court.

Plaintiff claims damages on account of an alleged failure by defendant to receive certain property for transportation. He alleges in his petition that on the thirteenth of October, 1879, he entered into a verbal contract with defendant, whereby it agreed to receive and ship for him two car-loads of potatoes from Enfield, a station on its road, in Clayton county, to Denison, Texas, at 83 cents per 100 pounds; that, by the terms of the agreement, the property was to be received by defendant, and shipped on the seventeenth of October, and that on that day plaintiff had the property at said station ready for delivery, and there offered to deliver it to defendant, and demanded that defendant then receive and ship the same, but that defendant neglected and refused to furnish storage or cars for the transportation thereof, or to ship the same, by reason of which plaintiff was compelled, for his own protection against damage, to find storage for the property in as convenient a place as possible, in the vicinity of defendant's depot at said station, and that he used due diligence in protecting the same, and that from day to day thereafter he requested defendant to receive and ship the property, but that it neglected and refused to do so until the second day of November following, when it furnished cars, and demanded of plaintiff that he at once load the property upon them, which he did, and that, owing to the coldness of the weather at the time, 10 bushels of the potatoes were frozen before the cars were loaded, and were thrown away; that said cars were not moved until the next day, and when the property arrived at its destination it was injured and damaged by freezing, to such extent as that it was nearly valueless. And it is charged that the loss was occasioned by defendant's failure and refusal to receive and transport the property until the season was so advanced that it was necessarily exposed to frost. There was a verdict and judgment for plaintiff. Defendant appeals.

W. A. Hoyt and Noble & Updegraph for appellant.
Blair & Norris for appellee.

REED, J.—Plaintiff claims to have made the alleged verbal contract with defendant's station agent at Enfield. The agent was

examined as a witness, and testified that he did not agree to have cars at the station to ship the potatoes to Denison at any definite time. There was evidence, however, which would warrant the finding that he did agree that the necessary cars for the transportation of the potatoes would be at Enfield on the seventeenth of October, and that he would receive and ship them on that day. It is undisputed that on the thirteenth of October he informed plaintiff that he could give him a rate of 83 cents per hundred pounds on potatoes, by the car-load, to Denison, Texas, and that plaintiff accepted that rate. After this arrangement was entered into plaintiff made arrangements with the farmers from whom he purchased the potatoes, to deliver them at Enfield on the 17th, and on that day he received at the place a sufficient quantity to load two cars, but defendant did not on that day have cars at that station on which to load them. Plaintiff thereupon stored a portion of the potatoes in a cellar, and the balance in an elevator and warehouse convenient to the depot. Between that day and the second of November he, on a number of occasions, requested the station agent to receive and ship them, but cars were not furnished for their transportation until the latter date. On that day he was informed by the agent that two cars were at the station, on which he could load the potatoes; but if they were not loaded in time to be sent out on the next train, which would pass that station on the morning of the 3d, the cars would be sent back empty. He accordingly loaded them on that day, and they were sent forward the next morning. Before they were sent forward, however, he was required to and did pay the freight to their destination, and the agent issued to him a bill of lading by which defendant undertook to transport the property to Davenport, in this State, which is the end of its line, and there deliver it to a connecting carrier. This bill of lading also recited that the property was received at the owner's risk. The weather was warm and pleasant on the seventeenth of October, and so continued until about the 30th, when it turned cold, and when the potatoes were loaded upon the cars it was freezing, and it remained quite cold until after the cars were sent forward. The potatoes were covered in the cars with straw and blankets; but when they arrived at Denison it was found that they had been badly frozen, and much the greater part of them were rendered entirely worthless. Plaintiff first applied to the agent for information as to the freight charges to Denison before he purchased the potatoes, and the latter communicated with defendant's general freight agent on the subject, and the rate of 83 cents per hundred was offered to plaintiff, in compliance with instructions given by him to the station agent.

The cars on which the potatoes were shipped belonged to the carrier whose line connected with defendant's line at Davenport, and the custom of the companies was, when freight was to be re-

ceived on defendant's line for transportation over the line of the connecting company, for the latter to furnish the cars on which to load the same at the place of shipment, and the failure of defendant to deliver cars at an earlier date for the shipment in question was occasioned by the failure of the connecting company to furnish them. The district court instructed the jury that, before plaintiff would be entitled to recover, he must prove either (1) that the station agent had express authority from defendant to make the alleged parol contract; or (2) that he was held out by defendant as possessing such authority; or (3) that defendant, with full knowledge of the facts, had ratified the contract. Defendant excepted to this instruction. It also objected to the evidence offered to establish the making of the contract by the agent, on the ground that his authority was not shown. The overruling of this objection, and the giving of this instruction, are now assigned as error.

It is contended that there was no evidence which had any tendency to prove either that the agent had authority to make the alleged contract, or that he was held out as having such authority, or that defendant had ratified the contract. In a former opinion filed in the case we sustain this view. A rehearing was granted, however, and upon a re-examination of the record we have reached the opposite conclusion. The agent, it is true, testified, in general terms, that he had no authority to make contracts with shippers for cars at a definite day. He did not testify, however, that he was restricted in that regard by special instructions from his employer, or by any general rule of the company. His statement may have been the mere expression of his opinion or conclusion as to the extent of his authority. At least, it is fairly susceptible of that construction, and it is by no means conclusive on the question. As stated above, he was empowered by the general freight agent of defendant to contract for the transportation of such property as plaintiff desired to ship to Denison, Texas, at 83 cents per hundred pounds. This instruction was given in contemplation of the fact that, as the property was to be delivered to the connecting carrier for transportation over its line, it should be loaded upon cars belonging to that company. It therefore necessarily empowered him to contract for the shipment at a future date. It was also given in contemplation of the nature of the property to be shipped; and, in the absence of special instructions or restrictions, empowered him to make such contracts, as to the time of shipment, as the nature of the property required. Suppose the company should authorize an agent to contract with a shipper for the transportation of fresh meat to a distant market in hot weather. It would hardly be contended, in such case, that the agent was not empowered to contract that the property should be carried in a car specially adapted to the transportation of that kind of property, or that he was not authorized to bind his prin

AUTHORITY OF
AGENT TO MAKE
CONTRACT.

cial by an agreement to receive and transport it at a particular time. The authority to make the engagement, if unrestricted, would carry with it the power to contract with reference to all the details of the transaction. The property in question was not as perishable, perhaps, as a car-load of fresh meat would be in mid-summer. It was liable, however, to be greatly injured or entirely destroyed by freezing. When the agent was empowered to contract for its transportation, weather sufficiently cold to injure or destroy it, if not properly protected, was liable to occur at any time. It was therefore of the highest importance to the shipper that a definite time should be fixed for the shipment; and unless the power of the agent was limited by some rule or instruction of the company, the authority conferred upon him to contract for the transportation of the property carried with it the power to make such agreement, with reference to the time when it should be received and shipped, as the necessities of the case demanded. The district court was therefore warranted in submitting to the jury the question whether he had express authority to make the alleged contract.

It was also warranted in submitting the question whether he was held out by defendant as authorized to make such contract. He was the only representative of the company at that station. He was placed there for the purpose of trans-
AGENT HELD OUT
AS HAVING
AUTHORITY.
 acting its business at that place. He was authorized to contract, in its name, for the transportation of property of the kind in question, and had authority to receive it for shipment. Shippers had the right to assume, in the absence of information to the contrary, that he had authority from his principal to contract for the doing of whatever was reasonably necessary to be done in the shipment of such property. By placing him in charge of its business at that station, and empowering him to contract for the shipment of such property, it held him out as possessing the authority to contract with reference to all the necessary and ordinary details of the business. Within the range of that business, he was a general agent. 2 Redf. Rys. 141.

We are aware that what is here said is not in harmony with our holding in *Wood v. Chicago, M. & St. P. R. Co.*, 59 Iowa, 196; s. c., 21 Am. & Eng. R. R. Cas. 36. We entertained such grave doubts, however, as to the correctness of our holding in that case, that we announced to counsel, when this rehearing was granted, that we would review the question upon the final hearing. Our conclusion is that that case, in so far as it holds that the defendant, for the purpose of defeating its liability upon a contract made by a station agent within the apparent scope of his authority, may show that in making it the agent acted in violation of instructions of which the shipper had no notice, ought not to be followed. Shippers, as a rule, are required to deal with these agents in mak-

ing contracts for the shipment of property. They are agents of the company's own selection, and are employed to represent and act for it; and to hold that contracts entered into by them, within the apparent scope of their authority, may be defeated by secret limitations upon their authority, would impose, in many cases, very grievous hardships upon those who are compelled to deal with them. The soundest considerations of public policy demand that the rule should be otherwise; and this view is well sustained by the authorities. See 2 Redf. Rys. 139-141; Hutch. Carr. § 269; Deming v. Grand Trunk R. Co., 48 N. H. 455; Pruitt v. Hannibal & St. J. R. Co., 62 Mo. 527; Harrison v. Missouri Pac. R. Co., 74 Mo. 364.

In the view we have taken of the question already discussed, the question whether there was any evidence of a subsequent ratification by defendant of the acts of the agent is not very material. But, without discussing that question, we may say that, in our opinion, there was evidence which fairly entitled plaintiff to have it submitted to the jury.

2. The district court instructed the jury that, if plaintiff was guilty of any negligence, or want of ordinary care in loading the potatoes, which contributed to the injury and damage of which he complains, he could not recover. Counsel for defendant concede that the instructions on this question are abstractly correct. They contend, however, that upon the undisputed evidence the court should have ruled that, as matter of law, plaintiff was guilty of such negligence in loading the potatoes on the cars at the time he did load them as defeated his right to recover for any injury which occurred to them after that time. As stated above, the weather was cold and freezing at the time the cars were loaded. Some of the potatoes which were stored in the warehouse were already frozen. Plaintiff, at the time, expressed to the station agent some apprehension that they would freeze if loaded at that time. But the agent gave it as his opinion that they could be protected from freezing if properly covered in the cars with straw. Plaintiff did accordingly cover them with straw and blankets, and he testified that he made the best provision for their protection which he was able to make under the circumstances. Under this evidence, the question whether he acted negligently or with due care was for the jury. Different minds might fairly arrive at different conclusions from it as to whether due care was exercised in loading the property. Whitsett v. Chicago, R. I. & P. R. Co., 22 Am. & Eng. R. R. Cas. 336.

3. The district court refused to give an instruction asked by the defendant, to the effect that the duties and obligations of a common carrier, with respect to the goods, commence with the delivery to him, and that the delivery to him must be complete before he is charged with the duty of seeing to their safety. As an abstract proposition, the instruction is

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probably correct. But we think it is not applicable to the case made by the pleading and evidence. Plaintiff does not complain that defendant was guilty of any breach of its duties as a common carrier after it received the property into its possession. His complaint is that it violated its contract to receive and transport it at a particular time, and that it refused to receive it within a reasonable time thereafter, and that the injury resulted from this violation of contract and refusal to receive the property. The cars were sent forward with the first train after they were loaded, and it is not claimed that thereafter defendant was guilty of any wrong or negligence with reference to the property, and no question arose in the case to which the instruction was pertinent.

4. The court instructed the jury, in effect, that if the station agent made the alleged verbal contract and he had express authority to make it, or was held out by defendant as having such authority, and plaintiff had the potatoes at the station at the time specified in the contract, and offered to deliver them, but defendant did not receive them, or within a reasonable time thereafter furnish the cars for their shipment, and the injury to them occurred in consequence of its failure or refusal to receive and ship them within a reasonable time after that date, it was liable for the damages occasioned by such injury. The objection urged against these instructions is that the injury which the property sustained after it was loaded upon the cars was not the proximate consequence of defendant's neglect or failure to receive and ship it an earlier date, but was occasioned by the elements and plaintiff's act in loading it upon the cars at the time he did. This doctrine was also expressed in instructions asked by defendant at the trial, but which were refused by the court. The maxim invoked by defendant, while it is well settled and familiar, is not always of easy application to the facts of the case at hand. The general doctrine is that a party is responsible only for such consequences as are the natural and immediate result of his own fault. But it is often difficult to determine whether a particular result is the natural and proximate consequence of a particular act, or whether it should be attributed to some intermediate cause. It is well settled, however, in cases of contract, that the party in fault is responsible for such consequences of his failure as must have been contemplated by the parties when they entered into the agreement, even though they are the immediate result of intermediate causes. Thus, if a carrier should contract for the transportation of a car-load of fresh meat to a distant market in hot weather, and should agree to furnish a refrigerator car at the place of shipment, at a particular time, for its reception, and the shipper should produce the meat at that place at the time agreed upon, ready for shipment, but the carrier should fail to produce the car, and there was at hand no suitable place for the

storage of the property, and it should become tainted and damaged by its exposure to the weather, in that case the immediate cause of the injury would be the exposure of the meat to the weather, which would be the act of the shipper. The carrier would be responsible for the injury, however, for the reason that the parties had that matter in consideration when they entered into the agreement. The undertaking of the carrier, in effect, would be that the property should not be exposed to that danger, and the injury would be a proximate consequence of his breach of that undertaking.

In the present case it was well known to the parties, when they made the contract, that unless the potatoes should be shipped at an early date they would be liable to be injured or destroyed by freezing. The danger was one which would arise in the ordinary course of nature in this climate, and it must be presumed that the parties had it in consideration, and intended to guard against it, when they entered into the argument. If defendant had received and shipped the potatoes at the time agreed upon, or within a short time thereafter, the injury would not have occurred. Plaintiff bought the potatoes for the market to which they were afterwards consigned. He made efforts, between the seventeenth of October and the second of November, to dispose of them, but was unable to find a market for them. He made the best provision practicable for their protection during that time. If those stored in the elevator and warehouse had been permitted to remain there during the winter they would certainly have been frozen, and there was no other place at the station where they could have been safely stored. Under the evidence, we think it was properly left to the jury to determine whether their exposure to the danger, and the injury they sustained, were the proximate consequences of defendant's breach of the contract; and we also think that the finding of the jury on that question is fully sustained by the evidence. Other questions are argued by counsel, but, in the view we have taken of those considered in this opinion, they are not material.

We deem it proper to say that this is not a second appeal in the case between the same parties in 59 Iowa, 196, and 13 N. W. Repr. 99.

The judgment will be affirmed.

Power of Station Agent to bind Company.—See *Wood v. Chicago, etc., R. Co.*, 21 Am. & Eng. R. R. Cas. 36 and note.

Agents of Railway Corporations—Liability of Surety on Bond of Ticket-agent for Money stolen from Ticket-office.—C., a ticket-agent, upon being employed by a railroad company, gave a bond with two sureties that he would collect in cash all passage-money, etc., and *inter alia* "account for and pay over the whole thereof into the hands of . . . , and . . . in all respects attend diligently and faithfully to all his duties without fraud, neglect, or delay. . . ." On a morning during his employment by the company, he removed the cash on hand from the office safe and placed it in a wooden till

near the ticket-window, closed the office and went to a neighboring department of the company, to copy a report; he was absent about twenty minutes; upon his return he discovered that the office had been entered and the money he had placed in the till—\$947—had been stolen. In course of time the company brought an action of debt upon the bond of C. and his sureties, assigning breaches of the condition. *Held*, that there could be no recovery, unless the negligence of C. had occasioned the loss. *Baltimore & O. R. Co. v. Jackson* (Penn., 1886), 4 East. Repr. 121. See also *Ridley v. Brady*, 33 Alb. L. J. 181, where it was *held* that "sureties on a bond, conditioned that an employee shall account to his employer for goods and moneys intrusted to his care, are not liable for goods stolen from him without his fault."

Compensation of Secretary of Railway Corporation.—A person who is appointed and discharges the duties of the office of secretary of a corporation, and who is neither a director nor stockholder, is entitled to a reasonable compensation for his services although no rate of compensation was agreed upon, and there was no express agreement that compensation should be made. Such an officer, in this respect, stands in no different position from an employee of any other grade who has rendered service at the request of the corporation. *Smith v. Long Island R. Co.* (New York, 1886), 4 East. Repr. 718.

Implied Contract to employ and compensate Depot-agent.—Hill, the plaintiff, was depot-agent of defendant railroad company at Attala. Ball was superintendent of the railroad, having his office at Chattanooga, its north-eastern terminus. Wadsworth was assistant superintendent, having his office at Birmingham, which is near the centre of the line. Attala is between Chattanooga and Birmingham. Hill received notice from Ball, superintendent, notifying him to report to Wadsworth. He did so, when Wadsworth informed him he wished to transfer him to the office at Eutaw, a station lower down the road, and to place him in charge of the depot there. Accompanying him to the latter station, he placed him in charge, where he remained, performing the duties of station agent, for more than four years. While proceeding to Eutaw, and after reaching that place, Wadsworth, in answer to a question by Hill as to what his salary or wages would be, informed him it would be seventy-five dollars per month. It was not shown that Ball, the superintendent, ever fixed the salary, or said anything on the subject. The corporation paid Hill monthly at the rate of fifty dollars per month, which he received, and gave therefor customary receipts in full, on the pay-rolls. He sometimes protested, and he frequently claimed that an additional sum of twenty-five dollars was due him for each month; but the corporation never conceded it to him. No legal question was raised, however, on the effect of these receipts and acquittances, nor on the effect of Hill's continuance in the office, after he knew the corporation denied his right to the extra twenty-five dollars, monthly compensation. It was a mooted question of fact whether Wadsworth promised Hill seventy-five dollars per month for the service he was to render at Eutaw. Rulings of the court bearing on this question, and on the connected question whether, if he made such promise, the corporation was bound thereby, were the only legal questions presented.

Held, (1) that the appointment of an agent by or for a corporation, as by a natural person, may be implied from a confirmation of his acts, or an acceptance of his services without objection; and after such confirmation or acceptance the corporation cannot evade payment for his services by denying the validity of his appointment.

(2) That authority to do an act includes authority to do everything necessary and usual to its accomplishment; and authority to employ an agent or servant includes, in the absence of restrictive words, authority to make a complete contract, definite as to the amount of wages, as to all other terms.

(3) That a contract of employment may be express and definite as to all its terms, or it may be partly express and partly left to implication; and when services are performed under an express contract of employment, the wages or compensation not being specified, a recovery may be had under a *quantum meruit*. And

(4) That the statements and declarations of the assistant superintendent, while negotiating for the transfer, and up to the completion of the contract, were competent evidence against the railroad company. *Alabama Great Southern R. Co. v. Hill*, 76 Ala. 303.

Delegation of Authority of Agent—Ratification.—Except where a known usage of trade justifies, or necessity requires, the employment of subagents, an agent whose powers and duties involve personal trust and confidence and the exercise of judgment and discretion cannot, without authority from his principal, delegate to another the confidence and discretion reposed in him. Having, by his own judgment and discretion, determined what should be done, he may authorize another to perform the ministerial acts necessary to carry into effect the purposes of his employment, but he cannot turn his principal's business over to the judgment and discretion of another, and bind the principal by the acts and conduct of the latter. *Titus & Scudder v. Cairo & F. R. Co.*, 46 N. J. L. 393. 1 Sugd. on Powers, 214; Story on Agency, § 14; 2 Kent, 633; 1 Chitty on Contracts, 296 and note; *Commercial Bank v. Norton*, 1 Hill, 501; *Lewis v. Ingersoll*, 1 Keyes, 347; *Brewster v. Hobart*, 15 Pick. 302, 308.

Knowledge by the principal of the unauthorized act of the agent in assuming to make a contract for him, which the agent had no power to make, is essential to a ratification of the agent's act. If the agent fraudulently misrepresented his authority, and the principal has received the avails of the fraud without knowledge of the agent's fraudulent conduct, the remedy of the party injured against the principal is not upon the contract in damages, but by rescission of the contract and suit for the consideration paid. *Titus & Scudder v. Cairo & F. R. Co.*, 46 N. J. L. 393.

SIOUX CITY AND ST. PAUL R. CO. *et al.*, Trustees, v. CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO. v. SIOUX CITY AND ST. PAUL R. CO. *et al.*

(*Advance Case, United States. March 22, 1886.*)

The fact being that, upon certain lands granted to the State of Iowa by Congress to aid in the building of two railroads, the Sioux City R. and the Chicago, Milwaukee & St. Paul R. cross each other, the prior construction of the former road does not entitle it to the land, nor does the prior location of the latter road entitle it to such land, each to the exclusion of the other. The title acquired from the United States relates back to the date of the grant, and neither company can obtain any superiority of title by any act done by it, or by any omission to act by the other, provided there is no forfeiture of the grant. In such case the companies take the lands coming within the conflicting lines in equal undivided moieties. But as regards the indemnity lands provided for in the grant, which were to be taken outside

of the 10-mile limit, this tenancy in common principle does not prevail, but the priority of selection determines the question of proprietorship.

APPEALS from the Circuit Court of the United States for the District of Iowa.

John C. Spooner for Sioux City & St. P. R. Co.

John W. Cary for Chicago, M. & St. P. R. Co.

MILLER, J.—These are cross-appeals from a decree of the circuit court for the district of Iowa. In that court the Chicago, Milwaukee & St. Paul R. Co. brought its bill in chancery, on the fourth day of March, 1879, against the Sioux City FACTS. & St. Paul R. Co., which in due time was answered. The subject of contest in this suit was the right to certain lands granted by Congress to the State of Iowa to aid in building two railroads, which, however named originally, their right to the lands became vested in one or both of these companies. The grant of the lands was by a single statute, and was to the State as a trust for the construction of two roads which necessarily crossed each other, and by the act of Congress the place of crossing was to be in O'Brien county. The act granted for the aid of each road every alternate section of land designated by odd numbers for 10 sections in width on each side of said roads; and in the event that any of these odd sections had, when the lines of the roads were definitely located, been sold or otherwise disposed of, the usual grant of lands in lieu of them should, by the Secretary of the Interior, be caused to be selected, provided they were in no case to be located more than 20 miles from the lines of the roads. 13 St. at Large, 72, c. 84.

The roads to be benefited by this grant have both been completed, and both companies are entitled to the odd sections within 10 miles of their lines of road, and to the indemnity lands so far as they can be found of odd numbers within 20 miles. But as the roads cross each other these limits also cross and overlap, and the claims to the odd sections within those limits necessarily conflict. This presents questions which, at the time the suit was brought, were important, because the value of the land in controversy is large, and because many other land grants to railroad companies presented the same difficulty; but during the pendency of this suit in the circuit court, and on appeal here, all these questions have, it is believed, been decided by this court, so that nothing remains but to apply the principles of these decisions to the admitted facts of this case. *Cedar Rapids Co. v. Herring*, 110 U. S. 27; s. c., 14 Am. & Eng. R. R. Cas. 537; *Kansas Pacific Co. v. Atchison, T. & S. F. Co.*, 112 U. S. 414; *St. Paul Co. v. Winona Co.*, 112 U. S. 720.

(1) It was claimed by the Chicago, Milwaukee & St. Paul

Co., which, for brevity, will be called the Milwaukee Co., that, by reason of the prior location of the line of its road through the lands where the crossing finally took place, they acquired a priority for their entire claim, to the exclusion of the other company, within the limits of the lap. That is, that when their line was definitely located they became immediately entitled to every odd section within 10 miles of the road, and to the paramount right of selection of indemnity lands within 20 miles. (2) The Sioux City road asserted, by virtue of the fact of the prior construction of their road through the overlapping lines of the grant, that they had secured the paramount right which the other company claimed by reason of prior location.

Both these contentions are wrong. The title acquired from the United States relates back to the date of the grant, and neither company can obtain any superiority of title by any act done by it, or by any omission to act by the other, provided there is no forfeiture of the grant. This principle is fully decided in the case of *St. Paul R. v. Winona R.*, 112 U. S. 720. In such case the companies take the lands coming within the conflicting lines in equal undivided moieties. In the opinion above referred to it was held that, while this rule applied to what are called lands in place,—that is, those odd sections found within the 10-mile limit of the road,—as those 10 miles conflicted with each other, it did not apply to lieu lands or indemnity lands which were to be selected outside of the 10-mile limit. The reason of this was said to be that, with regard to the odd sections found within the original limits of the grant undisposed of when the line of the road was definitely located, that location ascertained the sections which passed by the grant, and fixed the right to such sections, whether it was the whole or the moiety of them. But no title to indemnity lands was vested until a selection was made by which they were pointed out and ascertained, and the selection made approved by the Secretary of the Interior. In a case, therefore, where two companies had this right of selection within the same limits, priority of title might be created by priority of selection, or some other mode than location of the road or priority of construction. The circuit court, in its decree, disregarded this distinction between lands found in place within 10 miles of each road and those within the indemnity limits, and applied the tenancy in common principle to the lands claimed as indemnity for others not found within the 10 miles as well as to those found within those limits and not sold or disposed of.

It appears from the record in this case that there are within the lap of the 20-mile limits of both roads, subject to the grants to these roads, both for lands in place and for lieu or indemnity lands, 189,595.98 acres, which constituted the subject-matter of this controversy.

TITLE ACQUIRED
RELATES BACK
TO DATE OF
GRANT.

1. Of these, 63,796.24 acres are within the 10-mile limit of the Sioux City road, and not within the 10-mile limit of the Milwaukee road, though they are within its 20-mile limit. The result of the rule on which the circuit court acted was to divide these lands equally between the two companies. But the principles we have stated, and which were fully considered in *St Paul Co. v. Winona Co.*, exclude the Milwaukee Co. in this case from invading the 10-mile limit of the Sioux City road to seek indemnity for losses by reason of lands within its own 10-mile limit previously disposed of. These 63,796.24 acres being odd sections within the 10-mile limit of the Sioux City road, and not within the 10-mile limit of the Milwaukee road, belonged exclusively to the former, and the latter company had no interest in them. The decree is in that respect erroneous, and must be reversed, and all these lands given to the Sioux City Co.

EXCLUSION OF
MILWAUKEE CO.
FROM TEN-MILE
LIMIT OF SIOUX
CITY ROAD.

2. Of the lands in controversy there were 33,071.8 acres within the 10-mile limit of the Milwaukee road, and not within the 10-mile limit of the Sioux City road, but within its 20-mile limit, which, according to the ruling of the circuit court, were equally divided between the two companies. For the same reasons which govern with regard to the 63,796.24 acres just disposed of, this part of the decree must be reversed, and these 33,071.8 acres given to the Milwaukee Co.

3. Of the lands in controversy there were 50,539.73 acres within the 10-mile limits of both roads. This the decree of the circuit court held to belong to the companies in equal undivided moieties, and appointed commissioners to make partition of them. This part of the decree was, upon the principles we have stated, correct and must be affirmed.

4. There remains to be considered 42,188.93 acres found to be within the 20-mile or indemnity limit of both roads, and not within the 10-mile or absolute grant limit of either road. As these lands are within the category of those to which no title accrued until a selection of them was made for one road or the other, there might arise some difficulty about priority of right between the two companies. But we are of opinion that the circumstances in which the title to these lands has been placed by the action of the State of Iowa, which was a trustee in the matter for both parties, and of the commissioner of the general land-office, the decree of the court dividing these lands equally between the parties was just. So far as any selection was made of these lands, it was by the State of Iowa, and the legal title was conveyed to her. Though they were certified to her by the Secretary of the Interior for the benefit of the Sioux City Co., and though the State conveyed them to that company, it is obvious that both the Secretary of the Interior and the governor of Iowa acted under the mistaken idea that the earlier

construction of its road, or its earlier location, by the Sioux City company gave it a priority of right in these indemnity lands, and as there was not enough to satisfy the demands of both companies, nor, indeed, of either of them, they, for that reason, conveyed them all to the Sioux City Co.

We think the action of the Secretary or the Interior, and of the governor of Iowa, under this mistake of law and of their powers, and especially the governor of Iowa, the common trustee of both these companies, cannot have the effect of destroying the rights of the parties. There was in fact no selection; all were wrongfully conveyed to the Sioux City Co. That part of the decree, therefore, which divides these lands equally, and directs the commissioners to make partition of them, is also affirmed.

As both parties appealed from the decree of the circuit court, and as each of them has succeeded in obtaining a reversal of an important part of the decree, the costs of the appeal will be equally divided between them, and the case remanded to the circuit court, with instruction to render a decree in conformity with this opinion.

Conflicting Grants—When Title attaches—Priorities.—In grants of lands to aid in building railroads, the title to the lands within the primary limits within which all the odd or even sections are granted relates, after the road is located according to law, to the date of the grant, and in cases where these limits, as between different roads, conflict or encroach on each other, priority of date of the act of Congress, and not priority of location of the line of road, gives priority of title.

When the acts of Congress in such cases are of the same date, or grants are made for different roads by the same statute, priority of location gives no priority of right; but where the limits of the primary grants, which are settled by the location, conflict, as by crossing or lapping, the parties building the roads under those grants take the sections, within the conflicting limits of primary location, in equal undivided moieties, without regard to priority of location of the line of the road or priority of construction.

A different rule prevails in case of lands to be selected in lieu of those within the limits of primary location, which have been sold or pre-empted before the location is made, where the limits of selection interfere or overlap.

In such cases neither priority of grant, nor priority of location, nor priority of construction, gives priority of right; but this is determined by priority of selection, where the selection is made according to law. *St. Paul, etc., R. Co. v. Winona, etc., R. Co.*, 112 U. S. 720.

LAND WRONG-
FULLY CONVEY-
ED TO SIOUX
CITY COMPANY.

CHICAGO, BURLINGTON AND QUINCY R. Co.

v.

JACKSON.

(Advance Case, Iowa. March 17, 1886.)

A party who takes possession of swamp lands after the board of supervisors of the county wherein the lands are situated has refused to accept the price offered, as it had a right to do in pursuance of an order of the county court withdrawing such lands from sale, acquires no legal or equitable title to the land.

APPEAL from Mills district court.

Action for possession of 80 acres of land in Mills county. The defendant set up an equitable defence, and the case was tried as an equitable action. There was a decree for the defendant. The plaintiff appeals.

Watkins, Williams & Wright for appellant.

D. H. Solomon for appellee.

ADAMS, C. J.—In 1866 Mills county had acquired title to the land in question, and held the same as swamp land. In that year the defendant applied to the board of supervisors, and FACTS. to the clerk of the board, to purchase the same, tendering the sum of \$1.25 per acre; but both the board and the clerk refused to sell the land to him, and refused to accept the money tendered, and never did accept it, and the same has been retained by the defendant. Notwithstanding these facts, however, the defendant took possession and made improvements, and has held possession since that time. In 1870 the county conveyed the land by and to the Burlington & Missouri River R. Co., and in 1875 that company conveyed it to the plaintiff. That the legal title is now in the plaintiff is indisputable.

The defendant, however, claims that he became the equitable owner by reason of his offer to purchase and tender of \$1.25 per acre, and that the conveyance to the Burlington & Missouri River R. Co. was made by mistake, under a contract which did not in fact entitle the company to the land, as was then supposed. The defendant claims that in 1855 the land was duly offered for sale at \$1.25 per acre, and remained in market, and was subject to sale, at that price, when he made application to purchase the same, and made the tender above set out. For the purpose of the opinion it may be conceded that in 1855 the land was offered for sale as the defendant claims. It appears, however, that in 1860 the county court ordered that no more swamp land should be sold until a

further order should be made in relation thereto. The order of the county court withdrawing the land was, if valid, in force at the time of the defendant's application and tender.

The defendant, however, contends that the court had no power to make the order withdrawing the land, and that the clerk of the board should have disregarded it and accepted his money and made him a deed. But under section 928 swamp lands were placed under the care and superintendence of the county courts, and by section 930 it was provided that the courts may order, a part only of the lands to be sold, as they may deem expedient, and by section 941 it was provided that the courts shall not sell or dispose of any more of said lands than shall be absolutely necessary to complete the reclaiming. We think that the court had the power to make the order in question.

The plaintiff having the legal title, and the defendant no title of any kind, it is perhaps not important to consider how the county came to convey to the plaintiff's grantor, or whether it did so by mistake or not. But the plaintiff's right seems to be reasonably clear. The conveyance was made in pursuance of a contract which called for "odd sections vacant." The defendant's position is that the land in question, though in an odd section, was not vacant because he was in possession. Under the view, however, which we have taken of the case, he was a mere trespasser. The county had expressly refused to sell to him, as he well knew. That the county regarded the land as vacant at the time it entered into the contract with the plaintiff's grantor must be presumed.

We think that the plaintiff was entitled to judgment for possession. Reversed.

HASTINGS AND DAKOTA R. CO.

v.

WHITNEY *et al.*

(*Advances Case, Minnesota. March 1, 1886.*)

An act of Congress of July 4, 1866, in aid of the construction of a railroad, grants to the State of Minnesota lands within certain limits, with the exception, among others, of those to which it "shall," when the line of road is definitely located, "appear . . . that the right of pre-emption or homestead settlement has attached." *Held*, that lands of which there is a homestead entry of record, valid upon its face, are within the exception.

APPEAL from a judgment of the district court, Ramsey county.
Cole & Bramhall for respondent.
M. O. Little for appellants.

BERRY, J.—The act of Congress of July 4, 1866, under which plaintiff claims title to the land in controversy, grants to the State of Minnesota (to whose rights plaintiff has succeeded) five alternate sections of land on each side of what is ^{ACT OF JULY 4, 1866.} now plaintiff's road; and provides that "in case it shall appear that the United States have, when the line or route of said road is definitely located, sold any section or part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved to the United States for any purpose whatever," the Secretary of the Interior shall select, for the purposes of the grant, so much public land "as shall be equal to such lands as the United States have sold or otherwise appropriated, or to which the right of homestead or pre-emption settlement has attached, as aforesaid: . . . provided, that any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement, or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act." The land in dispute is within what is known as the "granted" or "lands in place" limits of the grant. The important question in the case is whether an alleged homestead entry of one Turner of the land in controversy took it out of the operation of the grant.

The homestead law provides that a citizen of the United States who is head of a family may enter 160 acres of unappropriated public land subject "at the time the application is made" to pre-emption at \$1.25 per acre; and that the person "^{HOMESTEAD} ap-^{LAW.}plying" shall, upon application to the register of the land-office in which he is about to make such entry, make affidavit before the register or receiver that he is the head of a family, . . . and that such application is made for his exclusive use and benefit; that his entry is made for the purpose of actual settlement and cultivation; . . . and upon filing such affidavit with the register or receiver," and payment of a prescribed fee, "he shall thereupon be permitted to enter the amount of land specified." Rev. St. U. S. §§ 2289, 2290. A person desiring to make a homestead entry who by reason of actual service in the army or navy of the United States is unable to do the personal preliminary acts at the local land-office required by the provisions preceding, "and whose family, or some member thereof, is residing on the land which he desires to enter, and upon which a *bona-fide* improvement and settlement have been made," may make the affidavit required by law before his commanding officer, and "upon such affidavit being filed with the register by the wife, or other representative of the party, the same shall become effectual from the date of such filing." Rev. St. U. S. § 2293.

Turner's alleged homestead entry was made under this provision of law,—section 2293. So far as the forms of the papers evidencing his entry are concerned, they appear to have followed exactly those prescribed in the circular instructions issued to the local land-offices by the general land-office. See **PROPER ENTRY PAPERS.** Zab. Pub. Land Laws (1877), 151, 155, 172, 173 ; 2 Lester, Land Laws, 253. We perceive no reason why these forms were not properly prescribed, nor why they were not sufficient to satisfy the law ; and hence we are not able to agree to the first position taken by plaintiff's counsel, which we understand to be that the alleged homestead entry is void upon the face of the papers by which it is sought to be evidenced.

And this brings us to consider the counsel's second position, viz., that the entry, if not void upon these papers, is void upon the facts in the case. It is admitted in pleading, and found by the trial court, that at the time when Turner's application was made and his affidavit filed no improvement had been made on the land, and that no member of Turner's family has ever at any time resided thereon. The terms of the act of Congress except from the grant, **CONSTRUCTION OF HOMESTEAD ACT.** lands within its limits to which "it shall *appear*" that "the *right* of pre-emption or homestead settlement has *attached*." We italicize what seem to us to be emphatic words. If we felt at liberty to put an original construction upon them, we should say that the exception is not of lands to which some person claims that a right of pre-emption or homestead settlement has attached, or to obtain title to which under the pre-emption or homestead laws some merely formal steps have been taken by him, and that a right of pre-emption or homestead settlement cannot be said to have attached except through compliance with the substantial provisions of law which prescribe the manner and means in and by which such right is to be acquired.

Such would seem to us to be the plain and natural signification of the words used. As an original proposition, it would therefore have seemed to us that, upon the facts of this case found and admitted as before stated, Turner's entry was invalid, illegal, null, and void, and that it did not attach to the land, or exclude or except it from the operation of the grant under which plaintiff claims ; and this upon the ground that under the act of Congress (section 2293) the *bona-fide* improvement and settlement, and the residence of some member of his family upon the land, were indispensable conditions precedent to his right of entry, and were entirely wanting ; so that when plaintiff's road was definitely located, in March, 1867, this alleged entry made in May, 1865, did not appear to have attached to the land so as to except it from the grant. And this would seem to be in accordance with the charge to the jury in Union Pac. R. Co. v. Watts, 2 Dill. 310. But a long and almost unbroken series of rulings and holdings by the

land department of the United States is to the contrary. They are to the effect that a homestead entry of record, valid upon its face, *per se* constitutes the land thus purporting to be entered land to which it appears that the right of homestead settlement has attached, within the meaning of the various land grants which have been made in aid of the construction of railroads. This result is effected simply by an entry of record, valid upon its face, without reference to the validity of the entry in fact. *Thomas v. St. Joseph & D. C. R. Co.*, 2 Cobb, Pub. Land Laws, 869; *White v. Hastings & D. R. Co.*, Id. 876; *Dalton v. Southern Minn. R. Co.*, Id. 861; *Barbeau v. Southern Pac. R. Co.*, 9 Copp, Land-owner, 81; *Graham v. Hastings & D. Co.* (this case), Id. 236; *Whitney v. Maxwell*, 10 Copp, Land-owner, 104; *St. Paul, M. & M. Ry. Co. v. Rouse*, Id. 215; *Hastings & D. R. Co. v. U. S.*, 11 Copp, Land-owner, 172; *Southern Minn. R. Ext. Co. v. Gallipean*, Id. 264; *St. Paul, M. & M. R. Co. v. Forseth*, 12 Copp, Land-owner, 39; *U. S. v. Union Pac. R. Co.*, Id. 161; *Murphy v. Howe*, Id. 168; *Chicago, R. I. & P. R. Co. v. Easton*, Id. 259; *Hamilton v. Northern Pac. R. Co.*, Id. 277.

We have spoken of this series of rulings by the general land department of the United States as almost unbroken. If some rulings made in such cases as *Kniskern v. Hastings & D. R. Co.*, 2 Copp, Pub. Land Laws, 858, and *Larson v. St. Paul & P. R. Co.*, Id. 862, and possibly some earlier cases, are to be regarded as inconsistent with these (as is not altogether clear), they must be treated as overruled by the later holdings above cited. The act of Congress of June 2, 1872 (section 2308, Rev. St. U. S.), evidently rests upon the propriety of a construction of the law like that given by the land department.

As to the weight to which the practical construction thus given to the land laws is entitled, we quote, as fully applicable to this case, what is said by the supreme court of the United States in *U. S. v. Burlington & M. R. Co.*, 98 U. S. 341, cited in *Kansas Pac. R. Co. v. Atchison R. Co.*, 112 U. S. 414: "Such has been the uniform construction given to the acts by all the departments of the government. Patents have been issued, bonds given, mortgages executed, and legislation had upon this construction. This uniform action is as potential and as conclusive of the soundness of the construction as if it had been declared by judicial decision. It cannot, at this day, be called in question." We may add that the cases of *Burlington & M. R. Co. v. Abink*, 14 Neb. 96; *Atchison, T. & S. F. R. Co. v. Pracht*, 30 Kan. 66; s. c., 12 Am. & Eng. R. Cas. 267; *Kansas & P. R. Co. v. Dunmeyer*, 113 U. S. 629, appear to take or to tend towards the same view of the effect of the land-grant acts upon homestead and pre-emption entries taken by the land department; and the cases of *U. S. v. Union Pac. R. Co.*, 12 Copp, Land-owner, 161, and *Hamilton v. Northern Pac.*

R. Co., Id. 277, show that as to the Dunmeyer Case this is the understanding of the department itself.

Following the construction of the general land-office in cases of this kind, we are compelled to hold that Turner's entry, being of record and valid upon its face, took the land out of the operation of the grant; and hence the judgment appealed from, which was for plaintiff, is reversed.

Rights of Settler against Railway Company.—A settler who has entered public land of the United States under the provisions of the homestead law, although no patent has been issued, has an inchoate title to the land, which is property. This is a vested right which can only be defeated by his own failure to comply with the conditions of the law. If he complies with these conditions he becomes invested with full ownership and the absolute right to a patent. Under the act of May 14, 1880 (21 U. S. St. 140), his right relates back to the date of his settlement. As against such homesteader, a railroad company has not, under the act of March 3, 1875, a right of way over the land, unless such right was acquired by compliance with the provisions of the act before the date of his settlement. *Red River, etc., R. Co. v. Sture* (Minn., 1884), 20 N. W. Repr. 229.

Railroad Land Grant—Homestead—Pre-emptions.—Under the acts granting lands to aid in the construction of a line of railroad from the Missouri river to the Pacific ocean, the claim of a homestead or pre-emption entry, made at any time before the filing of that map in the general land office, had attached, within the meaning of those statutes, and no land to which such right had attached came within the grant. *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629.

Adverse Claim of Actual Settler—Held valid against Land Grant.—Against an actual settler under a homestead or pre-emption claim valid and subsisting at the time of the railroad company's definite location of its railroad, the railway company obtains no rights by virtue of its land grant or the definite location of its road. *Fearns et al. v. Atchison, T. & S. F. R. Co.*, 6 Pac. Repr. 237 (Kansas, 1885), citing *Atchison, T. & S. F. R. Co. v. Pracht*, 30 Kan., 66, 12 Am. & Eng. R. R. Cas. 267.

Homesteader's Claim adversely to Land Grant held valid.—In 1863, and prior and subsequent thereto, the land in controversy was a portion of the public domain of the United States, subject to homestead entry, pre-emption, etc. In the early part of January, 1868, Patrick Ryan settled upon and occupied the land in controversy, intending to procure the same under the homestead laws of the United States. Afterwards, and on January 13, 1868, he attempted to make a homestead entry of such land at the United States land office at Salina, but in fact, and through a mistake, made an entry of another piece of land. On June 9, 1869, Lucius Manly filed a declaratory statement for a pre-emption entry of the same land which Ryan had intended to enter, alleging a settlement thereon on January 8, 1869. On June 30, 1869, the plaintiff railroad company definitely located its railroad opposite the land in controversy, and within less than ten miles thereof, and became entitled to the same under the Congressional land grant to the State of Kansas, for railroad purposes, of March 3, 1863 (12 U. S. St. at Large, 277), provided the homestead and pre-emption entries of Ryan and Manly were both illegal and void; but the railroad company did not become entitled to such land if either of such entries was valid. On July 9, 1869, Ryan filed an affidavit in the local land office, setting forth that when he filed his homestead application he intended to include therein the tract of land in controversy, but that the same was accidentally omitted from his papers; that he had cultivated and improved the tract named, and that Manly's filing was

not in good faith, and asked to be allowed to amend his application. He had, in fact, made lasting and valuable improvements on the land. Upon a hearing between these parties, in September, 1869, Manly's filing was cancelled, and Ryan was allowed to amend his entry so as to include the land in controversy.

Held, per Valentine, J.: "That Ryan, by settling upon said land and making lasting and valuable improvements thereon, and by attempting in good faith to make a homestead entry thereon, and believing that he had done so, obtained such an interest in equity in and to the land that the subsequent definite location by the railroad company of their road could not divest him of his interest in the land. It was such an equitable interest in the land that he had a right to have his entry thereof amended so as to make it appear to be just what it was intended and believed to be when he made his original entry. The decisions of courts of equity permitting instruments in writing to be reformed so as to make them just what the parties intended that they should be, but which, through some mistake of the parties, they were not, furnishes great support to this proposition. There ought to be power somewhere to correct mistakes of this kind; and the proper place for such power to be vested is undoubtedly, in the first instance, in the land offices, but finally in the courts. In the present case the correction was permitted to be made by the local land offices, and their action was sustained by the Secretary of the Interior, and we think their action should be sustained by the courts."

Held, also, that Fearn, who entered the land as a homestead after Ryan abandoned it, took it free from any claim by the railroad company under its grant. *Fearn v. Atchison, T. & S. F. R. Co.*, (Kansas) 6 Pac. Repr. 287.

NORTHERN PACIFIC R. Co.

v.

LILLY.

(*Advance Case, Montana. January 7, 1886.*)

The act of Congress granting lands in aid of the Northern Pacific R. is not only a law but a conveyance, and imports a present and immediate transfer of title to the company of the lands described in the grant, which takes effect by relation, as of the date of the act, whenever the lands so conveyed are designated by the definite location of the line of the road.

Under such act, whenever the general route of the road had been fixed, the lands thereby granted were reserved from sale and held for the company, whether before or after the same had been surveyed; and thereafter no person could acquire any title thereto or interest therein, save by the act of the company. Such reservation was equivalent to a sale of the lands to the company, to the extent of giving it the right to protect the same as against all other persons. Having the exclusive right to sell the lands and to deliver possession, the company, to all intents and purposes, had the possession; and this, accompanied with the right to sell and to convey title, gave the company the right to protect their possession by action of ejectment or otherwise.

A complaint in ejectment is good if it aver the seizure of the plaintiff; the

possession of the defendant at the time of the commencement of the action, and the withholding of the possession.

APPEAL from the first district court of Custer county. The opinion states the facts.

Sanders, Cullen & Sanders for appellant.

Conger & Cox for respondent.

WADE, C. J.—This is an action in the nature of ejectment, brought by the plaintiff and appellant to recover the possession of certain lands from the defendant and respondent. A general demurrer to the complaint, for that it did not state a cause of action, was sustained, and the plaintiff abiding its complaint, judgment was rendered accordingly for the defendant.

From the complaint it appears that in the year 1864 the government, by act of Congress, granted certain of the public lands to the plaintiff in aid of the construction of a railroad from Lake Superior to Puget's Sound; that the general route and line of the road, opposite to and along the premises in controversy, which are within the boundaries of the grant, was fixed on the twenty-first day of February, 1872, and a map and plat thereof filed with the Secretary of the Interior, in the office of the commissioner of the general land-office, and that all lands included within the grant in said territory were thereupon withdrawn from sale and pre-emption except by the plaintiff, as provided in said act; that on the nineteenth of day May, 1881, the line of said road was by plaintiff definitely fixed near to said general route opposite to and along said premises, and within the distance of two miles therefrom, and a plat showing the definite location of the line of said railroad was thereafter, on the twenty-fifth day of June, 1881, filed in the office of the commissioner of the general land-office; that said road was constructed on said line along and opposite to said premises on or about the fifteenth day of December, 1881, and approved and accepted by the government on the thirtieth day of September, 1882; that on the twenty-first day of February, 1872, said premises were public lands, not reserved, sold, granted, or appropriated otherwise than by said act of Congress in granting certain of the public lands in aid of the construction of said railroad, and that thenceforth the said premises were reserved to and were the property of the plaintiff; and that the plaintiff, since the time of said road was so definitely fixed, has been the owner of, seized in fee, and entitled to the possession of said premises. It further appears that the defendant, on or about the first day of July, 1873, entered upon said premises and ousted and ejected the plaintiff therefrom, and ever since has withheld the possession thereof.

The only difference between the complaint and the one in the case of the Northern Pacific R. Co. v. Majors, 5 Mont. 111, is that

in the *Majors* case the entry and ouster by the defendant is alleged to have taken place subsequent to the time when the line of the road was definitely fixed, and a plat thereof filed with the commissioner of the general land-office, while in the present complaint the entry and ouster is alleged to have taken place subsequent to the time when the general route of the road was fixed, and the lands withdrawn from sale and pre-emption, and prior to the time when the line of the road was definitely fixed, and a plat thereof filed with the commissioner of the general land-office.

NORTHERN PAC.
V. MAJORS COM-
PARED.

Major's case and the authorities upon which it rests conclusively determine that the act granting lands in aid of the Northern Pacific R. is not only a law, but a conveyance of the highest character, and imports a present and immediate transfer of title to the company of the lands described in the grant, which takes effect by relation as of the date of the act, whenever the lands so conveyed are designated by the definite location of the line of the road. Before that time the grant is said to be afloat, but the location of the road anchors it, and causes the grant to take hold of and attach itself to the alternate sections of land along the designated line of location, the same as if these sections were named in the act.

The lands embraced within this grant to the Northern Pacific Co. consisted of alternate sections designated by odd numbers on each side of the line of the proposed road, and it was provided that whenever, prior to the time when the line of the road was definitely fixed, any of said sections, or parts of sections, should have been granted, sold, reserved, occupied by homestead settlers or pre-empted, or otherwise disposed of, other lands should be selected by said company in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, and designated by odd numbers, not more than ten miles beyond the limits of said alternate sections. These limitations upon the grant are similar to those found in numerous other grants of land by Congress in aid of railroads. Their object is obvious. The sections granted could be ascertained only when the routes were definitely located.

LIMITATIONS UP-
ON THE GRANT.

This might take years, the time depending somewhat upon the length of the proposed road and the difficulties of ascertaining the most favorable route. It was not for the interest of the country that in the mean time any portion of the public lands should be withheld from settlement or use, because they might, perhaps, when the route was surveyed, fall within the limits of the grant. Congress, therefore, adopted the policy of keeping the public lands open to occupation and pre-emption and appropriation to public uses, notwithstanding any grant it might make, until the lands granted were ascertained; and provided that if any sections set-

tled upon or reserved were then found to fall within the limits of the grant, other land in their place should be selected. Thus settlements on the public lands were encouraged without the aid intended for the construction of the roads being thereby impaired. *Railroad Co. v. Baldwin*, 103 U. S. 426.

The grant to this company, however, contains a limitation upon the right to settle upon or pre-empt any of the lands included within the grant, after the general route of the road has been fixed. After that event transpires said lands are reserved from sale and held for the company, whether before or after the same have been surveyed; and if it should be held that the absolute title of the company did not attach until the definite line of location had been fixed, still, the land having been reserved from sale, except by the company, no person could thereafter acquire any title thereto or interest therein save by the act of the company.

Section 6 provides that the President of the United States shall cause the lands to be surveyed for forty miles in width on both sides of the entire line of said road, after the general route shall be fixed, and as fast as may be required by the construction of said railroad; and the odd sections of land hereby granted shall not be liable to sale, or entry, or pre-emption before or after they are surveyed except by said company as provided in this act, but that the general pre-emption laws shall be, and the same are extended to all other lands on the line of the road when surveyed, except the lands granted to the company. This section is itself a grant, and a legislative reservation and withdrawal of the lands granted from sale or pre-emption except by the company.

After the general route of the road has been fixed, it provides that the odd sections "hereby granted" shall be reserved from sale or pre-emption, except by the company; that is to say, whenever the odd sections are designated by fixing the general route of the road the grant attaches and becomes certain and absolute. "And the odd sections of land hereby granted shall not be liable to sale before or after they are surveyed," except by the company. This prohibition is absolute. This land is reserved from sale by Congress. It is a legislative reservation, and takes effect whenever the general route of the road is fixed; and thereafter no person could acquire any right or interest in the land reserved from sale except by act of the company, the grantee of the government.

The averments of the complaint are that after the passage of said act, the general route of the line of said road through the Territory of Montana was fixed and adopted by the company on the 21st day of February, 1872, and a plat and map thereof filed with the Secretary of the Interior in the office of the commissioner of the general land-

SECTION 6 CON-
STRICTED.

RESERVATION OF
ODD SECTIONS.

AVERMENTS
COMPLAINT.

office, and that the said Secretary did, therefore, on said day, make an order withdrawing all the sections of land designated by odd numbers, in the said act referred to, to the amount of twenty alternate sections per mile on each side of said railroad line through said Territory from sale, entry, and pre-emption, except by the plaintiff, as in the act provided.

This act of the Secretary in withdrawing said sections from sale was not necessary, for Congress had declared that they should not be liable to sale after the general route of the road had been fixed. This declaration by Congress was a reservation of the lands, whenever the event transpired that caused it to take effect.

It must be presumed that the President, after the general route of the road had been so fixed, caused said lands to be surveyed, as provided for in section 6 of said act, but whether he did or not, the lands were reserved from sale, except by the company, both before and after they had been surveyed, and this reservation took place by operation of law and as in said act provided.

This reservation of said lands from sale and pre-emption, except by the company, protected the lands for the company, and would so continue to protect them until the order making said reservation had been revoked and said act repealed.

EFFECT OF RE-
SERVATIONS.

Such a reservation made by operation of law was equivalent to a sale of the lands to the company to the extent of giving to the company the right to protect the same as against all other persons. Having the exclusive right to sell the lands and to deliver possession thereof to the purchaser, the company, to all intents and purposes, had the possession, and this, accompanied with the right to sell and to convey title, gave the company the right to protect their possession by action in ejectment or otherwise, against every and all other persons. The reservation of said lands from sale and pre-emption, except by the company by operation and in pursuance of law, was the consummation of the grant to the company, and the title so conveyed related back to the date of the grant, and was equivalent to a title in fee. After such reservation in behalf of and for the benefit of the company, consequent upon the general route of the road having been fixed, the grant was no longer afloat, but it attached itself to and took hold of the designated sections as if they had been named in the act.

All that the act and all that the decisions require, in order to consummate the grant, is that the alternate sections be designated. Fixing the line of the general route of the road does cause the alternate sections along said line to be designated, and to be reserved from sale and pre-emption, except by the company; and fixing the line of definite location, if the same is along the line of the general route, as in this case, does not add anything to the efficacy of the grant. That only does what has already been done before, by

operation of law, whenever the general route of the road has been fixed.

The defendant entered upon the premises in question, which are situate within the boundaries of the grant to plaintiff, and within two miles from the line of the general route and definite location of the road in 1878. At that time the line of the general route of the road had been established, and the alternate sections, in consequence thereof, and by operation of law, had been withdrawn from sale and pre-emption except by the plaintiff. It was not possible, therefore, at that time, for the defendant to have acquired any interest in or title to said premises, which were a part of one of the alternate sections aforesaid, save from the plaintiff who owned and held the title thereto. The government could convey no title or right, for the reason that the premises had been previously reserved and withdrawn from sale and pre-emption for the benefit of the plaintiff who held the exclusive right to sell and dispose of the same. The defendant, therefore, when she entered upon said premises and ousted the plaintiff, was a mere trespasser, without color of right or authority; and she claims no rights by adverse possession. Under our decisions a complaint in ejectment is good, if it aver the seizure of the plaintiff, the possession of the defendant at the time of the commencement of the action, and the withholding of the possession. *McComley v. Gilmer*, 2 Mont. 202; *Herbert v. King*, 1 Id. 475. This complaint contains these necessary averments, and the demurrer thereto ought to have been overruled.

Judgment reversed, and remanded.

Operation of a Land Grant as a Conveyance.—See *Vance v. Burlington & Mo. R. Co.*, 10 Am. & Eng. R. R. Cas. 623; *Van Wyck v. Knevals*, 10 Id. 664.

UTAH AND NORTHERN R. CO.

v.

FISHER, Assessor.

(*Advance Case, U. S. Supreme Court. December 14, 1885.*)

Congress having ceded to a railroad company a strip of land running through a portion of the public land set apart for an Indian reservation, the land so ceded was thereby withdrawn from the reservation, and became subject to the laws of the Territory within the limits of which it was situate.

APPEAL from the Supreme Court of the Territory of Idaho.

John F. Dillon and *A. J. Poppleton* for appellants.

Jos. K. McCammon for appellee.

FIELD, J.—The plaintiff became a corporation of Utah under an act of the Territory of February 12, 1869, for the incorporation of railroad companies; and by the act of Congress of June 20, 1878, it was made a railway corporation, not only of FACTS. that Territory, but of Idaho and Montana also, with the same rights and privileges it had under its original articles of incorporation, with a proviso, however, that it should thereafter be subject to all laws and regulations in relation to railroads of the United States, or of any Territory or State through which it might pass. 20 St. c. 362, § 2. It now owns and operates in Idaho a railroad which, for the distance of 69 miles and a fraction of a mile, passes through a tract of land in the county of Oneida, known as the "Fort Hill Indian Reservation," which was on the thirtieth of July, 1869, set apart by order of the president for the Bannock tribe of Indians, pursuant to the provisions of a treaty between the United States and the eastern band of Shoshonees and the Bannock tribe concluded July 3, 1868. 15 St. 673.

In 1882 there was levied under the laws of the Territory upon the railroad, its depots, and other property within the reservation, for territorial and county purposes, a tax amounting in the aggregate to \$4478. The defendant is the assessor and tax collector of the county, and the tax having become delinquent, he was proceeding to enforce it by a sale of the property, when the plaintiff commenced this suit in the district court of the county to restrain him, contending that the property being within the boundaries of the Indian reservation is withdrawn from the jurisdiction of the Territory. A preliminary injunction was granted, but at the hearing the court held that the property was subject to taxation, and that the tax was duly levied. The injunction was accordingly dissolved and judgment rendered for the defendant. On appeal to the supreme court of the Territory this judgment was affirmed.

The contention of the plaintiff is that the Indian reservation is excluded from the limits of Idaho by the act of March 3, 1863, creating the Territory; or that it is necessarily excepted from the jurisdiction of the Territory by the treaty of ACT OF 1863, AND
TREATY OF 1868. July 3, 1868. Neither position can be sustained. The first section of that act embraces within the boundaries of the Territory the reservation; and the proviso upon which the plaintiff relies only declares that nothing shall be construed to impair the existing rights of the Indians in Idaho, so long as they shall remain unextinguished by treaty, or to include within its boundaries or jurisdiction any lands which, by treaty with the Indian tribes, were not, without their consent, to be included within the limits or jurisdiction of any State or Territory; or to affect the authority of the government of the United States to make any regulations respecting the Indians, their lands, property, or other rights, by treaty, law, or otherwise, which it would have been competent for

the government to make if the act had not passed. 12 St. 808. The proviso excludes from the limits and jurisdiction of Idaho only such lands as by treaty were not to be included without the consent of the Indians, and it recognizes the authority of the United States to make the same regulations respecting the lands, property, and other rights of the Indians which it would have been competent to make before the passage of the act. There was at that time no treaty with the Indians that the lands which might be reserved to them should be thus excluded from the limits and jurisdiction of any State or Territory. The clause of the proviso on that head has therefore no application. *Harkness v. Hyde*, 98 U. S. 476, in which it was held that the jurisdiction of the Territory did not extend over the reservation, was decided upon the mistaken belief that such a treaty existed, and that to it the proviso referred. This error was corrected in *Langford v. Monteith*, 102 U. S. 147. As no such treaty existed, the proviso did not exclude the reservation from the limits or the jurisdiction of the Territory.

By the treaty it was agreed that whenever the Bannocks desired a reservation to be set apart for their use, or the President deemed it advisable to put them upon a reservation, he should cause a suitable one to be selected in their country. It was under this agreement that the Fort Hill reservation was subsequently established and the Bannocks placed upon it. The treaty provided a reservation for the Shoshonees, and declared that they should enjoy various rights and privileges, and that the Bannocks, when their reservation was made, should have the same rights and privileges therein. Among other things, it was stipulated that the reservation should be set apart for their absolute and undisturbed use and occupation, and for such other friendly tribes or individual Indians to whose admission from time to time they and the United States might consent; and that no person should ever be permitted by the United States to pass through, settle upon, or reside on the reservation, except those designated in the treaty, and such officers, agents, and employees of the government as might be authorized to enter therein in the discharge of duties enjoined by law. The treaty also provided for the punishment, according to the laws of the United States, of any person among the Indians who should commit a wrong or depredation upon the person or property of any one, white, black, or Indian, subject to the authority of the United States, and at peace therewith; and that no treaty for the cession of any portion of the reservation held in common should be of any force or validity as against the Indians, unless executed and signed by a majority of the adult male Indians occupying or interested therein; and that no cession should be construed to deprive, without his consent, any member of the tribe of his right to land selected by him under the treaty.

It is contended by the plaintiff that these stipulations cannot be carried out, if the laws of the Territory are enforced on the reservation; and in support of the position special emphasis is placed upon the clause in regard to persons passing over, settling upon, or residing in the Territory, and the clause touching wrong-doers among the Indians. As these treaty provisions have the force and effect of a law, it is insisted that the reservation is excluded from the general jurisdiction of the Territory, as effectually as if the exclusion was made in specific terms.

TERITORIAL
JURISDICTION IN
RESERVATION.

To uphold that jurisdiction in all cases and to the fullest extent would undoubtedly interfere with the enforcement of the treaty stipulations, and might thus defeat provisions designed for the security of the Indians. But it is not necessary to insist upon such general jurisdiction for the Indians to enjoy the full benefit of the stipulations for their protection. The authority of the Territory may rightfully extend to all matters not interfering with that protection. It has, therefore, been held that process of its courts may run into an Indian reservation of this kind, where the subject-matter or controversy is otherwise within their cognizance. If the plaintiff lawfully constructed and now operates a railroad through the reservation, it is not perceived that any just rights of the Indians under the treaty can be impaired by taxing the road and property used in operating it. The authority to construct and operate the road appears from the agreement of July 18, 1881, between the United States and the Indians, which was ratified by act of Congress of July 3, 1882. That agreement recites that the Utah & Northern R. Co. had applied for permission to construct a line of railway through the reservation, and that the Indians had agreed, for the consideration thereafter mentioned, to surrender to the United States their title to so much of the reservation as might be necessary for the legitimate and practical uses of the road. A strip of land and several parcels adjoining it, forming part of the reservation, were ceded to the United States for the consideration of \$6000, to be used by the company and its successors or assigns as a right of way and road-bed, and for depots, stations, and other structures. By an act of Congress confirmatory of the agreement the same right of way was relinquished by the United States to the company for the construction of its road; and the use of the several parcels of land intended for depots, stations, and other structures was granted to the company and its successors or assigns, upon the payment to the United States of the \$6000; and on the condition of paying any damages which the United States or Indians, individuals or in their tribal capacity, might sustain by reason of the acts of the company, or its agents or employees, or on account of fires originating in the construction or operation of the road. By force of the cession thus made, the land upon which the

railroad and other property of the plaintiff are situated was, so far as necessary for the construction and working of the road, and the construction and use of buildings connected therewith, withdrawn from the reservation. The road and property thereupon became subject to the laws of the Territory relating to railroads, as if the reservation had never existed. The very terms on which the plaintiff became a corporation in the Territory rendered it subject to all such laws, and, of course, to those by which the tax in controversy was imposed.

The only answer of the plaintiff to this view is that, by the stipulation of the parties and the finding of the court thereon, it appears that the railway and property which are taxed are situated within the boundaries of and upon the reservation. If this be so, it does not follow that the result would be changed. The moment that the road was lawfully constructed it came under the operation of the laws of the Territory. The stipulation and finding must, however, be read with reference to the legislation of Congress, and therefore as only establishing that the road and property are within the exterior boundaries of the reservation. They will not be so construed as to allow the company to escape taxation by the force of a stipulation as to an alleged fact which that legislation shows does not exist. Judgment affirmed.

UNITED STATES

v.

CENTRAL PACIFIC R. Co.

(*Advances Case*, U. S. C. C. January 29, 1886.)

Under the act of 1866, 14 Stats. 239, granting land to aid in the construction of the California & Oregon R., lands outside the forty-mile limit of the specific grant, and within the exterior limits of an alleged Mexican grant, are subject to selection in lieu of the alternate odd sections otherwise disposed of, at the time of the definite location of the road, situated within the forty-mile limit, at any time after the final rejection of such Mexican grant.

The grant does not attach to the odd sections of lands outside the forty-mile limit of the specific grant, until the selection is, actually, made by the railroad company under the direction of the Secretary of the Interior, in lieu of lands otherwise disposed of within said limit.

If, at the time such selection of outside lieu lands is made, a claim under a Mexican grant embracing the lands selected within its exterior limits has been finally rejected, the lands have ceased to be *sub judice*, and are subject to selection.

Although such lieu lands have been selected and patented, prematurely, before the final rejection of the grant, yet, in a suit by the United States to vacate the selection and patent, commenced long after the final rejection of

the grant, on the ground that it was issued by mistake, will not be sustained where it does not appear that any private party has acquired any interest in the land so selected, or that the government has become subject to any obligation in relation to said land, and has sustained no injury by reason of such premature selection and patent.

In such case, if the patent were vacated, the railroad company would now be entitled to select an equal amount of other lands within the limits, and even to select the same lands, they being now subject to selection, and to receive a new patent therefor. A court of equity will not correct a mutual, innocent mistake from which no injury can result, when it would be inequitable to do so. It will not do a vain thing.

The owners of the land at the time of filing a bill in equity to vacate a United States patent are indispensable parties to the bill; and where it appears at the hearing that the bill is filed, only, against parties who have no interest in the lands, it will be dismissed for want of necessary parties.

Where three exterior boundaries of a Mexican grant and the quantity of land are designated, the fourth exterior boundary is found by running a line parallel to the opposite boundary, a sufficient distance therefrom to include the quantity of land called for.

S. G. Hilborn for complainant.

Bennett & Wigginton for respondent.

SAWYER, C. J.—This is a suit, on the part of the United States, to vacate three patents, alleged to have been improperly issued, by mistake, to respondent, for lands under the congressional grant to the California & Oregon R. Co., to aid in the construction of a railroad under the act of July 25, 1866. 14 Stats. 239. The patents cover, in the aggregate, something over twenty thousand acres. It is alleged that, at the time the grant attached by the definite location of the road, the lands were within the exterior limits of a Mexican grant, a claim for confirmation of which was then pending, and undetermined in the courts; and being *sub judice*, they were not public lands, and therefore not within the terms of the grant. The dates of the patents, respectively, are March 5, 1872, March 17, 1875, and December 20, 1875. The plat of definite location provided for under the act was filed on July 1, 1867.

The alleged Mexican grant to Diaz was presented for confirmation, August 31, 1852, and rejected by the board of land commissioners, as invalid, October 30, 1854. The district court affirmed the decision rejecting the grant, March 15, 1858. On July 1, 1857, the claim was again rejected by the circuit court, and the decree of the circuit court was affirmed, on appeal, and the grant finally rejected by the United States supreme court, March 3, 1873. The grant, therefore, never had the approval of any one of the four tribunals through which it passed; and the original decree of 1854, rejecting it, was affirmed by each—showing that there never was any merit in the claim under the alleged grant.

It, thus, appears that the first patent sought to be vacated was

issued before the final rejection of the grant; and the other two, more than two years and two years and nine months respectively, after its final rejection. It is insisted, on the part of complainant, that the grant attached to the specific lands, on the filing of the map of definite location in 1867, before the final rejection of the Mexican grant, and that the lands being, then, *sub judice*, they were not public lands, and not within the terms of the grant, as held in regard to the Moquelemos grant, in *Newhall v. Sanger*, 92 U. S. 761. But these lands occupy a position entirely different from those involved in that case, and are not within that decision. None of these lands are within the forty-mile limit of the grant, to the specific odd sections of which, the grant, by virtue of the act, *ipso facto* attaches by the filing of the plat of definite location. The act grants "every alternate section of public land, not mineral, designated by odd numbers," to the number of ten, on each side of the road, or within a limit of forty miles, or twenty miles on each side; and then provides that "when any of said alternate sections, or parts of sections, shall be found to have been granted, sold, reserved, occupied by homestead settlers, pre-empted, or otherwise disposed of, other lands, designated as aforesaid, shall be selected by said companies in lieu thereof, under the direction of the Secretary of the Interior, in alternate sections, designated by odd numbers as aforesaid, nearest to and not more than ten miles beyond the limits of said first-named alternate sections"—that is to say, within ten miles outside of the forty-mile limit. The grant, in such cases, does not attach to the specific sections of outside lands, on the filing of the plat, but it remains a mere "float" until it is ascertained that there is a deficiency within the limits of the specific grant, and until the selections outside are, in fact, made, under the direction of the Secretary of the Interior.

The grant does not attach to the specific alternate sections of lieu lands until the selection is so made by the company which has the right of selection, and recognized and adopted by the Secretary. If at the time the selection is so made, recognized, and adopted, the lands have ceased to be *sub judice*, and are subject to grant, the rights of the company vest, and are valid.

This point is settled in the case of *Ryan v. The Central Pacific R. Co.*, arising under the same grant to the Oregon & California R. Co., and affected in precisely the same way by the claim under the same alleged Mexican grant to Diaz, 5 Saw. 260, affirmed on appeal by the United States supreme court, 99 U. S. 383. The land involved in that case was embraced in one of these very patents, that of March 17, 1875, and the case is, therefore, decisive on the identical question now presented. Both the circuit and supreme courts distinguished that case from *Newhall v. Sanger*, on the principle hereinbefore stated. The lands covered by the last two

patents set out in the bill are situated precisely as the lands in Ryan's case were, under the same grants, and judicial proceeding. They are all lieu lands, situate outside the forty-mile limit, and required to be selected before the congressional grant attached. The lands were selected, and patented, after the rejection of the Diaz grant, and after they had ceased to be *sub judice*. The title is, therefore, perfect as to the lands covered by the two patents issued in 1875, as is settled by the case cited. The patents were, therefore, properly issued, and as to those two patents the bill must be dismissed.

The only difficulty I have in the case relates to the first patent, issued in 1872, before the final rejection of the claim under the Diaz grant; and while the lands so selected and patented were still *sub judice*, and for that reason FIRST PATENT. only, at the time, not subject to selection under the decision of *Newhall v. Sanger*. The lands embraced in this patent were also all lieu lands, situated outside the forty-mile limit of the specific grant. They are, therefore, in an entirely different position from those inside the forty-mile limit. Those inside the forty-mile limit, under the decision of *Newhall v. Sanger*, being *sub judice* at the time the grant attached to the specific odd sections, were not within the terms of the grant at all, but were regarded, in a certain sense, as otherwise disposed of, and the subsequent removal of the cloud over them did not bring them within the grant. But being reserved, or so otherwise disposed of as to prevent the attaching of the congressional, grant, Congress provided for supplying the deficiency, not out of these same lands after the claim should be rejected, but out of other outside lands that should be open to grant when the selection should be made. Congress intended that the company should have its ten sections of land to a mile of the road, and provided that the lands outside might be selected in lieu of those already appropriated inside. In Ryan's case, the supreme court held that the deficiency may be made up by selections made outside, at any time after any lands covered by a pending claim are released from that claim; after they cease to be *sub judice* and become, in every sense, public lands, open to other disposition. Now, the only difficulty in regard to this patent is that the selection and patent were premature. Had the company waited till after the rejection of the Diaz claim before SELECTION PREMATURE. selecting, the selection and patent of identically the same lands would have been good. If this selection and patent fail, the defendant has not yet received all the lands to which it is entitled; and it is still entitled to select an equal amount of outside lands within the prescribed limits, provided a sufficient quantity of unappropriated lands is left for the purpose. It does not appear that anybody else has acquired any interest in these lands patented, and since they are patented it is not probable that

any adverse interest in them has been acquired. If this patent should be vacated, therefore, being no longer *sub judice*, the defendant would now be entitled to select these identical lands, to compensate for the loss, and receive another patent for them. The Diaz grant having long since been finally rejected, the lands would be now open for selection, in pursuance of the decision in Ryan's case. The result might be only the substitution of another patent to the same lands for the one vacated, at a great deal of further trouble and expense both to the United States and to the respondent.

The very defence to this suit, brought long after the final rejection of the grant, and the claim now set up to the lands under these patents, is a manifestation, now, of an intent to select those lands. Morally and legally the defendant is, at this time, clearly entitled to have these identical lands, there being no adverse claims to them. There is really no equity shown, now, in favor of the government. On the contrary, the equities are all in favor of the defendant. The government has realized all the benefits to be derived from the construction of the road. It made the same innocent mistake, if mistake there was, made by the defendant, whereby the defendant may lose a part of its lands, and treated these lands as subject to grant; and having done so, it has, presumably, received double the ordinary price for the alternate even sections. So that it has, in fact, given away nothing and lost nothing. It has received all it ever would have received, had the grant not been made, and the road either not been built or been built. The government is not, and it never would have been, entitled to anything more. Whereas, on the other hand, the defendant, in case of the vacation of the patent, has not got its full consideration—has not got all the land to which it is entitled, and which the government is bound to give, and it is, now, entitled to select the very same lands, should the patent be vacated. In fact, the probability is that all the other lands have already been sold by the government, and the purchase-money received by it, so that there will, at this time, be no lands except these out of which the grant can be satisfied. It does not appear that the United States has assumed any obligation to any other persons with respect to these lands, or that they can in any way sustain any injury by the action already had, merely prematurely taken, or that anybody else has acquired any adverse interest or claim in the lands, or will in any way suffer by reason of these patents.

The vacation of this patent would involve the necessity of issuing another for the same or an equal amount of other lands, if any there be—of substituting a new patent for the one vacated. Courts of equity will not do a vain thing—will not sustain a bill where no injury results from a mere innocent

EQUITY IN FA-
VOR OF DEFEND-
ANT.

VACATION
PATENT.

error in fact or law upon which it is based—and especially where that error consists merely in doing a little earlier than it should be done a thing entirely proper to be done at the right time, and which if now undone must be done over again. “Courts of equity do not any more than courts of law sit for the purpose of enforcing moral obligations or correcting unconscientious acts which are followed by no loss or damage.” 1 Story’s Eq. Jur. 203. Much less will it interfere where no injury results and there is only a mutual innocent mistake, there being no moral wrong, and where to correct the mistake in favor of the party complaining would be inequitable and work an injury to the other party. Besides, if these lands are now lost, all others open to selection having at this day-been disposed of, by reason of a change of circumstances the parties could not be placed *in statu quo*. 1 Story’s Eq. Jur. 138 a, 138 c.

I think this patent is now within the principles established in Ryan’s case ; on these grounds the bill as to this patent, also, should be dismissed.

A large portion of the lands—some six thousand acres, I believe—covered by these patents, and indicated in the answer and evidence, were conveyed in fee-simple, absolute, to various parties before the filing of this bill, and the defendant had at the commencement of this suit, and it now has, no interest whatever in them. There is no party to the bill having any interest in these lands. No decree can be made affecting those lands without having the holders or somebody before the court having an interest in them. *United States v. C. P. R. Co.*, 8 Saw. 81. The grantees of the patentee of these lands are indispensable parties to the suit. The bill must be dismissed as to those lands on this ground also.

So, also, the defendant has conveyed all of these lands, in trust, to secure the payment of ten millions of bonds issued and put upon the market. Although the respondent is CONVEYANCE OF LANDS IN TRUST. interested in the residuum after paying the bonds, and is, therefore, a proper and, doubtless, a necessary party as to all the lands not absolutely conveyed, as before stated, there is no bondholder, trustee, or representative of the bondholders, made a party to the suit, and no decree can be made affecting their rights, without their presence.

It is but just to observe, on behalf of the government, that this suit was commenced after the decision of *Newhall v. Sanger*, 92 U. S. 761, and before the decision in *Ryan v. C. P. R. Co.*, 99 Id. 382, and, in all probability, without noticing the distinction established by the latter case, which takes this suit out of the rule laid down in the former. Had the latter case been decided before the commencement of this suit, it is but reasonable to presume that it never would have been instituted.

The answer denies that certain portions of the lands embraced

in the first patent of 1871, and some embraced in the other patents, were within the exterior boundaries of the Diaz grant, and alleges that they are wholly outside those boundaries. If this be so, those lands so situated are, in any event, properly patented to the defendant, and the title to them is perfect. Whether they are within the exterior boundaries of the Diaz grant or not depends upon how those boundaries are located, and probably no two surveyors, if left to themselves, would have located them alike. Surveyor-general Hardenburg located them in 1873, and Colonel Von Schmidt again located them in 1880, under the direction and supervision of Surveyor-general Wagner, and, I presume, expressly for the purposes of this suit, as I know of no other occasion for their determination, but these locations differ very widely. In my judgment, Wagner's location is much more accurate than Hardenburg's. Wagner's seems to have been located upon the principles stated and approved by Mr. Justice Field in *Henshaw v. Bissell*, 18 Wall. 262, decided after Hardenburg's location was made. Says Mr. Justice Field: "With the breadth of the tract stated, the quantity limited, the southern and eastern lines designated, all the elements are given essential to the complete identification of the land. A grant of land thus identified, or having such descriptive features as to render its identification a matter of absolute certainty, entitled the grantee to the specific tract named." Id. 253.

I think upon the principle thus stated we have the elements from which the exterior boundaries of the Diaz grant can be ascertained with reasonable certainty. It is described in his petition, and the annexed *desiño*, which was an unusually good one. We find from these documents that his grant was "joining to the north with Mr. Larkin's farm, to the south with the plains, also vacant; to the east with lands already solicited, and to the west by the mountains; and the quantity was eleven square leagues. Turning to the *desiño* we find it platted in a parallelogram, as bounded on the north by Larkin's land, beyond which we cannot go, on the east by Jimeno's grant, on the south by a line drawn at right angles to the westward from Jimeno's west line, on the south of which line the lands, for a distance of many miles, appear to be vacant. The mountains are sketched to the west.

Thus we have all the elements for locating the grant with proximate and reasonable precision. Larkin's line on the north, Jimeno's on the east, the mountains on the west, and the quantity. Taking these given boundaries, and the fourth can only be drawn just far enough south to take in, with the other three boundaries, eleven square leagues of land. On any other principle there would be no certainty whatever, for the south line might just as well be drawn fifty miles further south as five.

This appears to me to be the only reasonable way of determining

the exterior boundaries of the Diaz grant, and I adopt it. It seems to have the approval of the United States supreme court, and this seems to be the theory of Surveyor-general Wagner's survey, in 1880, and the boundaries so located to have his approval. Upon this location of the exterior boundaries of the grant a considerable portion of the land in the oldest patent issued, as well as in the others, lies entirely outside of the exterior boundaries of the grant, and they were public lands, not *sub judice*, at the time of the selection and patent; and were then subject to be taken by the railroad grant, and were rightfully patented. On this ground, also, the bill must be dismissed as to all the lands embraced in the several patents which lie north of the south line of Larkin's rancho, and all lying south of a line drawn from the Jimeno ranch westward to the mountains, far enough south of Larkin's line to embrace eleven square leagues of land.

The bill must be dismissed on the several grounds indicated, and it is so ordered.

See Grinnell v. Railroad Co., 6 Am. & Eng. R. R. Cas. 518; Cedar Rapids, etc., Railroad Co. v. Herring, 14 Ib. 587.

BYBEE

v.

OREGON AND CALIFORNIA R. Co.

(*Advances Case, U. S. C. C., District of Oregon. Feb. 19, 1886.*)

The grant of lands and the right of way to the O. & C. R. Co. by the act of July 25, 1866 (14 Stat. 239), and the act of June 25, 1868 (15 Stat. 80), construed to be: 1. A grant of the odd sections of land within ten miles on each side of the line of the road, not otherwise appropriated or disposed of under the laws of the United States prior to the definite location of said line, on condition that the road is completed by July 1, 1880, for a breach of which condition the grantor alone can claim a forfeiture; 2. The grant of the right of way absolute, to take effect on the definite location of the line of the road from the passage of the act of 1866 as against any person claiming under a settlement or appropriation subsequent to the passage thereof, without condition, save that which the law tacitly annexes to the grant of any such franchise, the liability to be lost or forfeited for non-user ascertained and determined in a judicial proceeding instituted by the government for that purpose.

The declaration in section 8 of the act of 1866, that in case the road is not completed by the time prescribed "this act shall be null and void," taken in connection with the context, that the lands not patented to the company at the date of any such failure "shall revert to the United States," and the general purpose of the act, and the policy of Congress in passing it, amounts to nothing more than a declaration that the lands are granted on the condition that if the road is not completed in due time the portion then remaining unpatented or unearned may be reclaimed by the United States.

ACTION to recover damages. The opinion states the facts.
Edward B. Watson and James F. Watson for plaintiff.
E. C. Bronaugh for defendant.

DEADY, J.—This action was brought in the circuit court of the State, for Jackson county, to recover damages for an alleged injury to a water-ditch.

The defendant answered, denying sundry allegations in the complaint, and then set up a title or right of way in itself, over the *locus in quo*, under an act of Congress, to which defence the plaintiff demurred.

Thereupon the cause was removed by the defendant to this court, as one arising under a law of the United States, where the questions arising on the demurrer were argued by counsel.

It is alleged in the complaint that the defendant is a corporation duly organized under the laws of Oregon; that on September 3, 1883, the plaintiff was the owner in fee of an undivided half-interest in a certain water-ditch and right, situated on the south side of Rogue river, in said county, and in the possession thereof, as tenant in common with Daniel Fisher, when he and said Fisher, in consideration of two hundred and fifty dollars paid them by the defendant, conveyed to it the right to enter on said ditch and construct and operate its railway over the same; on condition, however, that it would not impair or obstruct the use or enjoyment of said ditch by said grantors, to which condition the defendant assented, and entered into possession of the premises in pursuance of said deed and subject to said condition; that, notwithstanding, the defendant constructed its road across said ditch in such a manner as to permanently obstruct and destroy the same; and that the defendant has appropriated said ditch to its exclusive use, so as to prevent the flow of water therein where said road crosses the same, to the damage of plaintiff seven thousand dollars.

It is stated in the defence in question, that the defendant was incorporated to construct and operate a railway and telegraph line from Portland to the southern boundary of the State; that by section 3 of the act of July 25, 1866 (14 Stat. 240), entitled "An act granting lands to aid in the construction of a railway and telegraph line from the Central Pacific R. in California to Portland, Oregon," there was granted to the defendant the right of way through the public domain, to the extent of two hundred feet in width wherever its road might be located on said lands; that the ditch, at the point alleged to be injured, was located and dug, and is situated on the public domain, where, on July 25, 1866, the defendant, by virtue of the grant aforesaid, had the right to locate its road, in doing which and in constructing and operating the same it became necessary for the defendant to appropriate two hundred feet in width of the land over which said ditch was located, and

construct and operate its road thereon, and that any injury which was done to said ditch was the result of such construction and operation, and not otherwise; that on May 17, 1879, said Fisher attempted to appropriate the land in question to his use under the mining laws of the United States, and therefore constructed said ditch over said "right-of-way land," which is the only claim said Fisher ever had or made thereto, and the plaintiff claims under said Fisher, and never had or made any other claim to the premises than the one so derived; and that the defendant took nothing by said deed from the plaintiff, for that it then owned by virtue of said grant all the right and property pretended to be conveyed thereby.

The causes of demurrer assigned to this defence are: 1. It does not state facts sufficient to constitute a defence; 2. The plaintiff is estopped on the facts stated from claiming the right of way under said act of July 25, 1866; and 3. The defendant forfeited its right of way under said grant by its failure to complete its road over the same on or before July 1, 1875.

By section 2 of the act of 1866 there was granted to the defendant, to aid in the construction of its road, every alternate section of the public lands, designated by odd numbers, ACT OF 1866. to the amount of ten such sections per mile, not otherwise disposed of by the United States, with the right to select from the odd sections within ten miles of each side of said grant lands in lieu of any that may be so disposed of prior to the location of the line of said road.

And by section 3 there was granted to it the right of way over the public lands to the extent of one hundred feet on each side of the road, where the same may pass over said lands.

By sections 6 and 8 of said act it is provided that unless "the whole" of the road is completed before July 1, 1875, the "act shall be null and void, and all the lands not conveyed by patent to said company" at the date of said failure "shall revert to the United States." But by the act of June 25, 1868 (15 Stat. 80), the time for completing the road was extended to July 1, 1880.

It is nowhere directly stated that the road was not completed within the time prescribed by Congress, but it is fairly inferable that such is the case from the fact stated in the complaint, and not denied in the defence, that on September 3, 1883, the defendant took a deed from the plaintiff giving the former the right to construct and operate its road, at a point between the termini thereof, across the ditch of the latter. And it is a matter of such common notority that the road was not constructed south of Roseburg until after 1880, and it is not yet quite completed to the southern boundary of the State, that the court may well take judicial notice of the fact; and on the argument it was practically admitted.

ROAD NOT COMPLETED IN TIME PRESCRIBED.

This act is a present grant, but the particular sections that pass to the company under it cannot be ascertained until the route is definitely located. But when ascertained, the title attaches from the date of the act. It is also a grant made on a condition subsequent—that the road shall be completed by a prescribed time. But no one can take advantage of a breach of this condition but the government—the grantor—and, in the nature of things, it can only do so by judicial proceedings authorized by law, or a legislative resumption of the grant.

This well-settled rule of law, concerning the operation of a condition subsequent annexed to an estate in lands in fee, and the effect of a breach thereof, has been uniformly applied by the Supreme Court to the grants of the public lands, made by Congress in aid of the construction of railways, with the condition annexed that they should be completed within a specified time. *Railroad v. Smith*, 9 Wall. 97; *Schulenberg v. Harriman*, 21 Id. 60; *Leavenworth R. Co. v. United States*, 92 U. S. 740; *Mo. R. Co. v. K. P. R. Co.*, 97 Id. 496.

But counsel for the demurrer contend that the language of the act of 1866 is peculiar, and that by operation of section 8 the act becomes "null and void," at once and *in toto*, whenever and as soon as there is a breach of the condition concerning the completion of the road.

But the general expression, "this act shall be null and void," is qualified by the words immediately following, "and all the lands not conveyed by patent to said company . . . at the date of any such failure shall revert to the United States." This shows how far and for what purpose the act would in such contingency become "null." Certainly, it would not become "null" as to the lands already patented under it, or earned in pursuance of it. In other words, it is to become "null" only so far as to allow the grantor to resume the grant, on a failure to comply with the condition, and then only as to the lands remaining unpatented or unearned. And but for this qualification the grant might have been wholly resumed or forfeited for any failure to comply with the condition, even in the construction of the last mile. And this construction of the section is in harmony with the general purpose of the act and the policy of Congress in making the grant.

In the leading case of *Schulenberg v. Harriman*, *supra*, the act making the grant did not, it is true, declare that the same should become "null and void" on a failure to comply with the condition and complete the road. But it did provide what in my judgment is but the legal equivalent in this respect of section 8 of the act of 1866; namely, "If said road is not completed within ten years, no further sales shall be made, and the lands unsold shall revert to the

United States." And so thereafter the act would cease to have any force or effect, and practically would be "null."

Nor did the failure to complete the road by July 1, 1880, in any view of the matter, cause the act of 1866 to become "null" as to the right of way. The grant of the right of way is a ACT NOT NULL AS TO RIGHT OF WAY. separate and distinct matter from that of the lands to aid in the construction of the road. The reversion or forfeiture provided for in section 8 of the act of 1866 does not include the right of way, but is limited to the "lands" remaining unpatented or unearned at the time of the failure. The grant of the right of way is without condition, except that which the law tacitly annexes to all such easements, the liability to be lost or forfeited for non-user, ascertained and determined in a judicial proceeding instituted by the government for that purpose. But it is also a present absolute grant, and takes effect when the line of the road is located from the date of the act, as against any intervening claim or settlement whatever. Whoever settled on or appropriated for any purpose, under any law of the United States, any portion of the public lands on the possible line of this road after July 25, 1866, did so subject to this grant of the right of way to this defendant.

It appears from the defence that the plaintiff never was the owner of the land in question, but that it has been occupied or appropriated by him and those under whom he claims since May, 1879, under the act of July 26, 1866 (14 Stat. 253), entitled "An act granting the right of way to ditch and canal owners over the public lands and for other purposes."

But this occupation commenced long after the passage of the act granting the right of way over this land to the defendant, and is subordinate thereto. And this is so without reference to the fact that the act under which the ditch was dug is one day later in time than the other. For no one can claim any right, under that act, to any particular place or piece of ground prior to his occupation or appropriation of the same thereunder.

The conclusion here reached in regard to the nature and effect of the grant of the right of way to the defendant is fully sustained by the supreme court in *Railway Co. v. Alling*, 99 U. S. 474, and *Railway Co. v. Baldwin*, 103 Id. 428. AUTHORITIES REVIEWED. In the latter of these cases, Mr. Justice Field suggests the reasons why grants of land in aid of the construction of railways have generally been made subject to the right of appropriation by individuals under the pre-emption and other like laws of the United States, between the date of the act making the grant and the fixing of the limits and operation of the grant by the definite location of the line of the road; while those of the mere right of way have been made absolute and to take effect from the passage of

the act, as against any location, claim, or settlement made after the date of the grant and before the definite location of such right.

He says: "The grant of the right of way . . . contains no reservations or exceptions. It is a present absolute grant, subject to no conditions except those necessarily implied, such as that the road shall be constructed and used for the purposes designed. Nor is there anything in the policy of the government with respect to the public lands which would call for any qualification of the terms. Those lands would not be the less valuable for settlement by a road running through them. On the contrary, their value would be greatly enhanced thereby. The right of way for the whole distance of the proposed route was a very important part of the aid given. If the company could be compelled to purchase its way over any section that might be occupied in advance of its location, very serious obstacles would be often imposed to the progress of the road. For any loss of lands by settlement or reservation, other lands are given, but for the loss of the right of way by these means no compensation is provided, nor could any be given by the substitution of another route."

In the construction of this ditch on the possible line of the defendant's right of way from Portland to the southern boundary of the State, the parties engaged therein took the risk that such line might be located on, along, or across the same, in which case their right under the ditch and canal act of 1866 must so far yield to the prior and better right of the defendant under the railway act of the same year. *Doran v. Central Pacific R. Co.*, 24 Cal. 259.

In this case the court say: "The grant by Congress of the right of way over any portion of the public land to which the United States have title, and to which private rights have not been attached under the laws of Congress, vests in the grantee the full and complete right of entry for the purpose of enjoying the right granted, and no person claiming in his own right any interest in the lands can prevent the grantee from entering, in pursuance of his grant, or can recover damages that may necessarily be occasioned by such entry."

But the plaintiff contends that the defendant is estopped by the acceptance of the deed of September 3, 1883, from asserting its prior title to the premises under the act of 1866, granting it the right of way over the same.

It is a well-established rule of law that ordinarily a vendee is under no obligation to support his vendor's title, and therefore he is not estopped to deny the same, except in a few cases where his conduct, in so doing, would be repugnant to his acceptance of the grantor's deed, or a claim made under it. *Society, etc., v. Pawlet*, 4 Pet. 506; *Blight v. Rochester*, 7 Wheat. 547; *Croxall v. Sherred*, 5 Wall. 287; *Merryman v. Bourne*, 9 Id. 600; *Sparrow v. Kingman*.

ESTOPPEL TO
DENY VENDOR'S
TITLE.

1 N. Y. 242; Coakley v. Penny, 3 Ohio St. 344; Stark v. Starr, 1 Saw. 24; Bigelow on Estoppel, 294.

This is a peculiar case, and my attention has not been called to one that is its exact parallel.

At the date of his deed, the plaintiff's ditch was constructed along and across the premises, but the legal right to the use and possession thereof for the purpose of its incorporation was in the defendant. From the date of the definite location of the line of the defendant's road, the plaintiff had no right or easement to or in the land within the defendant's right of way, and was, to all intents and purposes, a naked trespasser thereon. He therefore had nothing to sell or convey to the defendant. His possession, if any, was merely constructive. Under these circumstances, the parties apparently supposing that the plaintiff had acquired some right to flow the water over the premises, the defendant purchased the privilege of constructing and operating its road across and along the ditch for two hundred and fifty dollars, and on the further condition that it would not thereby obstruct or impair the same.

PLAINTIFF A
TRESPASSER ON
RIGHT OF WAY.

But this condition or covenant being incident to and dependent on the conveyance of some right in the premises to the defendant, if the latter is at liberty to show that nothing passed by such conveyance, the condition or covenant is left without consideration or support, and falls to the ground. But if there is any good reason in law or justice, notwithstanding the want of title in the plaintiff, that the defendant should keep this condition or covenant, it will be estopped to show a want of consideration from the plaintiff.

But the plaintiff has really parted with nothing, nor has the defendant obtained anything from him, although it has paid the plaintiff two hundred and fifty dollars. The ditch was dug on what turned out to be the defendant's right-of-way land, and the plaintiff in consenting to allow it to construct and operate its road thereon surrendered nothing to which it had any legal right. The conveyance was altogether an idle and superfluous act, and whatever misapprehension of the parties, as to their rights in the premises, may have induced it, in legal effect it is a mere nullity.

The case of Holden v. Andrews, 38 Cal. 119, is somewhat analogous.

Holden being in possession of a tract of the public land, sold or abandoned the same to Andrews for a specified sum, to be paid in the future. Andrews failed to pay, and Holden brought an action to recover the possession of the land, in which he had judgment. On the trial, the defendant offered to prove that since the sale he had acquired the title from the United States under the homestead law, which was not allowed, on the ground that he was estopped from setting up the after-acquired title from the United States without first surrendering the possession obtained by his purchase

from the plaintiff. On appeal, the judgment was reversed and a new trial ordered. The opinion of the court was delivered by Mr. Justice Sawyer, who said: "We think this is not a case that falls within the rule. The plaintiff did not pretend to have any other title than by naked possession."

In *Coakley v. Penny*, *supra*, 347, the court says: "The decisions in this country, in which the grantee and those claiming under him were held to be estopped to deny the title of the grantor, were cases in which the grantee received and held possession under the conveyance and relied upon it as his source of title, and not where the grantee held the title under a prior and independent conveyance."

Here the defendant derived nothing from the plaintiff, and does not rely on his conveyance as a source of title, but does rely on a title derived from the United States prior to such conveyance.

On the whole, my judgment is that this case is not an exception to the rule which allows a vendee to deny his grantor's title. And from the facts stated in this defence it clearly appears that the defendant took nothing by the conveyance from the plaintiff, and is therefore not bound to keep the condition or covenant therein concerning the plaintiff's ditch.

The demurrer must be overruled, and it is so ordered.

Railroad Land Grants—Act of Congress conferring Right of Way—Acceptance of Conditions.—The act of Congress approved March 3, 1875, entitled "An act granting to railroads the right of way through public lands of the United States," is in the nature of a general offer, which takes effect and becomes operative as a grant to a railroad company only when it has accepted its terms by a compliance with the conditions precedent prescribed in the act, and then only as of that date. *Red River, etc., R. Co. v. Sture* (Minn. 1884), 20 N. W. Repr. 229.

Title to Land fixed by Location of Railroad.—As soon as the location of the railroad is fixed, the title of the lands granted it by Congress becomes so fixed that it is not liable to be defeated by any entry or action of another person. *Schulenberg et al. v. Harriman*, 21 Wall. 44; *Chicago, R. I. & P. R. Co. v. Grinnell*, 51 Iowa, 476; s. c., 5 Am. & Eng. R. R. Cas. 447; s. c., 103 U. S. 739; *Simonson v. Thompson*, 25 Minn. 450; *Missouri, K. & T. R. Co. v. Noyes*, 25 Kans. 340; s. c., 5 Am. & Eng. R. R. Cas. 440; *Baltimore, etc., R. Co. v. Lawson*, 10 Am. & Eng. R. R. Cas. 655. But in a contest between two railroad companies it seems that this principle does not apply.

Railroad Line, when fixed.—The line of definite location of a railroad, which determines the rights of railroad companies to land under land-grant acts of Congress, is definitely fixed within the meaning of those acts by filing the map of its location with the commissioner of the general land-office at Washington. *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629.

Railway Route "definitely fixed," when.—The route was "definitely fixed" within the intention of the act of Congress of July 28, 1866, making a land grant to the St. Joseph & Denver R. Co., so that the grant attached to adjoining sections when the route was adopted by the company and a map designating it filed with the Secretary of the Interior. *Walden v. Knevals*, 114 U. S. 873.

Title to Land Grants dates back to Original Act.—In the case of congress-

sional land grants upon the location of the road, the title to the lands granted relates back to the date of the original act of Congress. *Flint & P. M. R. Co. v. Gordon*, 41 Mich. 420; *Missouri, K. & T. R. Co. v. Kansas Pacific R. Co.*, 97 U. S. 491; *Grinnell v. Railroad Co.*, 103 U. S. 739; s. c., 5 Am. & Eng. R. R. Cas. 447; *St. Joe & C. R. Co. v. Baldwin*, 103 U. S. 426; s. c., 5 Am. & Eng. R. R. Cas. 408; *Van Wyck v. Knox & Co.*, 106 U. S. 360; *Cedar Rapids & Mo. River R. Co. v. Herring et al.*, 110 U. S. 27; s. c., 14 Am. & Eng. R. R. Cas. 537; *Northern P. R. Co. v. Majors*, 14 Am. & Eng. R. R. Cas. 487; *Swann et al. v. Lindsey*, 14 Am. & Eng. R. R. Cas. 504; *Swann et al. v. Larmore*, 14 Am. & Eng. R. R. Cas. 519; *Southern P. R. Co. v. Dull et al.*, *supra*.

Title to Lieu Lands fixed by Selection only.—The mere location of a railroad does not vest in it any title to indemnity or lieu lands. No title to these accrues until they are actually selected according to law. *Missouri, K. & T. R. Co. v. Noyes*, 24 Kans. 340; s. c., 5 Am. & Eng. R. R. Cas. 440; *Atchison, T. & S. F. R. Co. v. Rockwood*, 25 Kans. 292; s. c., 5 Am. & Eng. R. R. Cas. 432; *Chicago, R. I. & P. R. Co. v. Grinnell*, 103 U. S. 739; s. c., 5 Am. & Eng. R. R. Cas. 447; *Kansas P. R. Co. v. Atchison, T. & S. F. R. Co.*, 113 U. S. 414; s. c., *supra*.

Land Grant—Exemption from Entry by Homesteader.—The act of July 3, 1866, 14 St. 79, which authorized the Secretary of the Interior to withdraw certain lands from sale on filing a map of the general route of the road with him, did not reserve such lands from entry under the pre-emption and homestead laws. *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629.

Homesteader charged with Notice of Prior Railway Land Grant.—A party entering lands included in the grant of July 23, 1866, subsequently to the performance by the company of the conditions required in that act, is affected with notice, and can take no title. *Walden v. Knevals*, 114 U. S. 873.

Homestead—Failure to Comply with Statute.—The subsequent failure of the person making such claim to comply with the acts of Congress concerning residence, cultivation, and building on the land, or his actual abandonment of the claim, does not cause it to revert to the railroad company and become a part of the grant. The claim having attached at the time of filing the definite line of the road, it did not pass by the grant, but was, by its express terms, excluded, and the company had no interest, reversionary or otherwise, in it. *Kansas P. R. Co. v. Dunmeyer*, 113 U. S. 629.

Sale of Railroad Lands—Preference as between Actual Settlers and Applicants—Conclusions deducible from Circular of Railway.—A railway land circular provided that "all persons who desire to purchase lands from the railroad company should make application to the land agent at the land-office of the company in San Francisco, California, either personally or by letter, describing the land by section, etc. . . . This application will be filed, and the land will not be sold without giving the applicant thirty days' previous notice. An application for land confers no right or privilege on the applicant. It is merely a notice that he wishes to buy. The first application is not given precedence. . . . Settlers and actual occupants, who in good faith cultivate and improve lands belonging to the company, will generally be given preference of purchase at the regular price, and they are invited to settle upon and improve the vacant lands, whether they are applied for or not by other persons. . . . Applications to purchase lands can be filed in the land-office of the company at any time after survey by the government, but no application will be acted upon until three months after . . . plats shall have been filed. . . . Blank applications will be furnished. . . . In filling in blanks it is requested that," etc.

Held, that from this circular it would appear that the railroad company was desirous of selling its lands; that it invited actual settlers and informed them that, generally, such settlers would be given a preference. It also invited applications for purchase; announced that it would file them; that

blanks would be furnished; gave instructions as to the mode of filling them. It specified that an application would confer no right or privilege on the applicant; and that, from the foregoing and other clauses in the circular, the following conclusions might be drawn: (1) The company did not desire to fix an iron-clad set of rules applicable to all cases without exception. (2) That its mode of selling was through applications to purchase filed in its land-office. (3) That to actual settlers on its lands who were such applicants for purchase a preference would usually be given, whether they were the first applicants or not. (4) The provisos that an application to purchase conferred no right, and that the first application is not given precedence over those which may be filed later, were inserted the better to enable the company to carry out its object of giving a preference to actual settlers.

Held, also, that an actual settler must file an application for the lands in order to secure priority of right to them. *Taylor v. Central Pacific R. Co.* (Cal. 1885), 8 Pac. Repr. 436.

Action to compel Assignment of Contract for Sale of Railway Lands—Evidence—Declarations—Notice—Right of Cestui Que Trust to compel Conveyance from Railway Company.—In an action to compel D. to assign to plaintiffs a contract for the purchase of certain railroad lands entered into by the Central Pacific R. Co. with said D. and to require said C. P. R. Co. to convey said lands to plaintiffs upon their making full payment therefor, *held*—

(1) That the declarations of the railway company's officers not made in the presence of D. nor with his knowledge were not admissible in evidence against D.

(2) That defendant D. might testify that, at the time he purchased the land in question, he had no knowledge that any portion of it was within the enclosure of the plaintiff, such testimony being material on the question of notice to defendant of plaintiffs' rights.

(3) That defendant might testify that when he contracted to purchase the land, he did not know, and had never heard, of any application by plaintiff to purchase the same.

(4) That plaintiffs' possession in order to impart notice of his rights and equities must have been actual, open, exclusive, notorious and visible. Citing *Smith v. Yule*, 31 Cal. 180; *Pell v. McElroy*, 36 Cal. 268; *O'Rourke v. O'Connor*, 39 Cal. 442; *Polack v. McGrath*, 25 Cal. 54.

(5) That the railroad company, having contracted to sell the land to defendant, D., was in the attitude of a trustee holding the legal title for him; and if the plaintiff was not entitled to relief as against him (D.), he was not in a position to force a deed from the railway company, D.'s trustee. *Taylor v. Central Pacific R. Co.* (Cal. 1885), 8 Pac. Repr. 436.

Possession is Notice.—A homesteader's open, notorious, and exclusive possession of property is notice of his rights to all persons, including a railroad company claiming a right to the land under its land grant. *Fearns v. Atchison, T. & S. F. R. Co.* (Kansas), 6 Pac. Repr. 237.

Conclusions of Law by land officers are not final or conclusive. *Fearns v. Atchison, T. & S. F. R. Co.* (Kansas), 6 Pac. Repr. 237.

Findings of Fact made by land officers in a contested case before them must afterwards, when relief is sought in the courts, be considered as final and conclusive. *Fearns v. Atchison, T. & S. F. R. Co.* (Kansas), 6 Pac. Repr. 237, citing *Tatro v. French*, 33 Kan. 49.

Ex-parte Proceedings before Land Officer.—Decision of land officers in an *ex-parte* proceeding will not in any case be considered as final and conclusive against parties who are not before them. *Fearns v. Atchison, T. & S. F. R. Co.* (Kansas), 6 Pac. Repr. 237.

MIDLAND R. Co.

v.

MILES.

(Law Reports, 30 Chan. Div., 634.)

Sect. 80 of the Railways Clauses Consolidation Act, 1845, applies to minerals lying more than forty yards from a line of railway, and enables the owner of minerals whose access to them is cut off by reason of a railway company having purchased from him the minerals lying under their line of railway, or within forty yards from it, to tunnel under the railway for the purpose of working his minerals which are on the other side of it. And this power extends not only to minerals in the ordinary sense of the word, but also to such a substance as clay, which is usually worked from the surface.

And by sect. 81 the mineral owner is entitled to be compensated by the company for any additional expense caused by his having to work the minerals in this way.

The defendant was the owner of the minerals lying in and under a triangular piece of land which was completely surrounded by three lines of railway belonging to the plaintiffs, and also of the minerals lying under certain portions of those three lines. The company had purchased the surface of the triangular piece of land, and also the surface of the land on which those parts of the three lines were constructed. The minerals in and under the lands so purchased were not in the first instance purchased by the company. The defendant, in April, 1885, gave the company notice, under sect. 78 of the Railways Clauses Consolidation Act, 1845, of his intention to work the minerals belonging to him in and under the triangular piece of land, and also under the lines of railway. The company gave the defendant notice that they were willing to make compensation for the minerals under the lines of railway, and arbitrators were appointed to assess the compensation. The defendant then gave the company notice that he intended to work the minerals in and under the triangular piece of land, and for that purpose to enter upon and across the line of railway.

Held, that such a mode of working would be a trespass, and that the defendant must be restrained from working in that way, but that he would be entitled to tunnel under the railway in order to work the minerals in and under the triangular piece of land, and the company must compensate him for the extra expense of so working.

MOTION for an injunction to restrain the defendant from trespassing on the plaintiffs' line of railway.

The defendant was the owner of the mines and minerals under a piece of land situate close to Knighton Junction on the plaintiffs' main line of railway from London to Leicester. The piece of land was completely surrounded by three lines of railway belonging to the plaintiffs, which formed a triangle.

The land forming the sites of the shaded parts respectively of the three lines of railway, and the land A inclosed between those shaded parts and the dotted lines in the plan, had been purchased by the company from, and conveyed to them by, the defendant's

predecessor in title. The conveyances contained no express conveyance or reservation of the mines and minerals under the lands conveyed. The defendant was the owner of other land lying on the north-east side of the plaintiffs' main line from London to Leicester.

On the 4th of April, 1885, the defendant gave to the plaintiffs, pursuant to sect. 78 of the Railways Clauses Consolidation Act, 1845, a notice in writing that he should, after the expiration of thirty days, commence to work, dig, get, and carry away the clay or rather minerals lying under the shaded portions of the lines of railway and under the piece of land A. On the 13th of June, 1885, the company gave the defendant notice that, inasmuch as the working and carrying away of the minerals under the shaded parts of the lines of railway would damage the works of the railway, the company were willing to make compensation for any estate and interest to which the defendant might be entitled in the mines and minerals under those shaded parts. On the 19th of June the defendant gave notice to the company that he required £12,000 as compensation for the minerals under the shaded parts and the minerals under the land A, and he afterwards gave notice to the company of the appointment of an arbitrator on his behalf to assess the compensation which he claimed.

The company refused to accept this notice, on the ground that it went beyond the notice which they had given. On the 27th of June the defendant's solicitors threatened that their client would work the clay under the piece of land A, and cart it across the plaintiffs' line of railway. The plaintiffs then commenced this action on the 7th of July, claiming an injunction to restrain the defendant, his servants and agents, from passing, with or without horses, carts, vehicles, and appliances, over, or otherwise trespassing on, the plaintiffs' lines of railway and works. On the 16th of July the plaintiffs appointed an arbitrator on their behalf, and gave notice thereof to the defendant. He on the 24th of July withdrew his claim to compensation for the minerals under the land A, and appointed an arbitrator on his behalf. At the same time he served on the company a notice in writing that he should within six days proceed to enter upon and across the company's railway, for the purpose of working and carrying away the minerals in and upon the piece of land A. The company then gave notice of motion for injunction in the terms of their claim in the action.

Cozens-Hardy, Q. C., and Phipson Beale for the company.
Everitt, Q. C., and Chadwyck Healey for the defendants.

PEARSON, J.—I do not intend to express a finally concluded opinion as to the proper construction of the sections of the Railways Clauses Consolidation Act, because I am now dealing with an

interlocutory application only. I think I am right in saying that in a recent case the court of Appeal laid down again that which I conceive to have been formerly for many years the rule of this court with regard to the granting of interlocutory injunctions, viz., that, if the court can see that there is a great probability of the plaintiff's succeeding at the trial of the action, or if, upon the balance of convenience and inconvenience, the balance is strongly in favor of granting an injunction, then the court will be right in granting a temporary injunction until the case can be fully heard and decided at the trial.

I agree with Mr. Everitt that a railway company and the rights of a railway company are the creatures of statute, and that a railway company does not stand with regard to its land in the same position as an ordinary purchaser in fee simple absolute. I must, therefore, look solely to the act in order to see what are the rights as between the company and the defendant in this matter. [His lordship stated the facts and continued:] Sec. 77 of the Railways Clauses Act states most positively that an ordinary conveyance of land to a railway company shall not include the minerals under the property. That provision is undoubtedly intended more or less for the protection of the railway company. It saves the company from having to expend their money in purchasing the minerals, if, at the time when they make the purchase, there is little probability of the minerals ever being worked. It puts off the evil day of reckoning for the company, until such time as the owner of the minerals under the railway desires to work them. The moment the owner in whom the minerals remain vested desires to work them, either under the railway or within the prescribed distance, *i.e.*, forty yards, if no other distance is prescribed, sect. 78 provides that he is to give thirty days' notice to the company, and the company are then either to purchase the minerals lying under the railway, or, if that is not sufficient for their protection, the minerals lying within forty yards of the railway, or, if the company are so minded, they may neglect the notice, and not purchase; but in the latter case the owner is remitted to all his rights with regard to the minerals. He is at liberty then to work the minerals as he pleases, provided that he does so in the proper and usual manner. And in the recent case of *Midland R. Co. v. Haunchwood Brick & Tile Co.*, 20 Ch. D. 552; *s. c.*, 6 Am. & Eng. R. R. Cas. 555, an owner had given notice to a railway company to purchase the clay which formed the substratum of the railway, and the company had declined to do so, whereupon the owner proceeded to dig the clay in such a manner as to let down the railway, and the court held that he had a right to do so. For these two cases, therefore, the act has provided; it has enabled the company to purchase the minerals, and it has provided what the owner's rights are to be, if

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the company declines to purchase them. But there is a third case, and that is the present case, for which, as I read the act, it has also provided. The railway might be made across mineral

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THE ACT.**

property—mineral property lying on both sides of the line when constructed, and it occurred to the draughtsman that, the company having purchased, at the time when the railway was made, so much of the surface as they required, if the owner of the minerals at any future time desired to work them, and the company gave him notice to purchase so much of them as might be necessary for the support of their railway, the result might be that the company would then in effect erect a barrier across the property, separating one portion of the mineral property of the owner from the other portion, so that his only way of access from the one side to the other of the minerals which he desired to work would be either over or under the railway. To allow him to go over the railway would be in effect to put an end to that which the legislature had thought would be beneficial to the public, viz., the existence of the railway, because it is plain that the traffic of the railway could not be carried on with safety to the public, if the mineral owner was allowed to be perpetually carting minerals across the railway from the one side to the other. The interference with the railway would be so constant and so great as to stop the whole traffic of the line. Therefore the legislature, desirous of protecting the rights of the owner of the mines, and desirous also of protecting the railway company, have provided, by sect. 80, that, in that event, the mineral owner shall be at liberty to make all necessary passages under the railway without doing injury to the railway, so as to enable him to work the minerals on the one side from the other side. That, to my mind, is the meaning of the 80th section of the act. The heading of the fasciculus of sections from 77 to 85 inclusive is this: "And with respect to mines lying under or near the railway, be it enacted." That seems to me to include mines which lie at a greater distance than forty yards. Then sect. 78 gives the com-

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pany power to purchase mines under the railway and within forty yards of it, and sect. 80 says, "If the working of any such mines under the railway or works, or within the above-mentioned distance therefrom, be prevented as aforesaid by reason of apprehended injury to the railway" (I read that as meaning that if the working of any mines under the railway works, or within forty yards therefrom, be prevented by reason of the company purchasing those mines), "it shall be lawful for the respective owners, etc., of such mines, and whose mines shall extend so as to lie on both sides of the railway, to cut and make such and so many airways, headways, gateways, or water-levels through the mines, measures, or strata, the working whereof shall be so prevented" (that is, if necessary, through the whole forty yards on either side of the line) "as may be requisite to en-

able them to ventilate, drain, and work their said mines." Then it prescribes the dimensions of the airways, headways, gateways, and water-levels, and adds, "Nor shall the same be cut or made upon any part of the failway or works, or so as to injure the same, or to impede the passage thereon." It seems to me, therefore, that the act itself has provided what is to be done when the company have in this way severed the mines of a mineral owner, and that, instead of his having the right, which is claimed by this defendant, of going across the railway, the act says, "You shall be at liberty to go under the railway, but in going under it you must work in such a manner as not to injure it or impede the traffic thereon." Then sect. 81 provides for the extra expense to which the owner may be put by reason of his being required to work his mines in this way. EXTRA EXPENSE OF OWNER. It says that, "The company shall from time to time pay to the owner of any such mines, extending so as to lie on both sides of the railway, all such additional expenses and losses as shall be incurred by such owner by reason of the severance of the lands lying over such mines by the railway, or of the continuous working of such mines being interrupted as aforesaid" (that is by the barrier interposed by the company), "or by reason of the same being worked in such a manner and under such restrictions as not to prejudice or injure the railway, and for any minerals not purchased by the company which cannot be obtained by reason of making and maintaining the railway." Now in the present case, the defendant is the owner of mineral property lying on both sides of the railway. On the one side he can work without injury to the railway at all. The railway company, by giving him notice to purchase the minerals under the railway, have erected a barrier between one part of his property and the other part. It seems to me that the 80th section gives him power to make passages under the railway to enable him to work the severed minerals, and the 81st section gives him a right to compensation for any additional expense which he may incur, and any loss which he may suffer, by reason of his having to work the minerals in that way. Mr. Everitt urged very strongly that, inasmuch as the minerals which the defendant desires to work (gypsum, or clay, or something of that sort) lie on the surface, it will not be practically possible for him to work them in that way, and that the injunction would practically prevent him from working them at all. But the 81st section meets that difficulty also, for OWNER ENTITLED TO COMPENSATION. it provides that for any minerals which cannot be obtained, and from which the owner is cut off, the company are to compensate him. Under these circumstances, I think the company are right in saying that the defendant is not entitled to trespass upon the railway in order to carry the minerals across it. Ample means are given him by the act, either, if he works the minerals at a greater

expense, of obtaining compensation from the company, or, if he cannot get the minerals at all, of claiming from the company their value. I must, therefore, grant the injunction.

Minerals under or near Railway—Right of Owner to work Mines.—See *Poutney v. Clayton*, 14 Am. & Eng. R. R. Cas. 476; *Midland R. Co. v. Haunachwood, etc., Co.*, 6 Id. 555; *Errington v. Metropolitan District R. Co.*, 6 Id. 562.

Minerals under Right of Way—Compensation of Land-owner—Right of Land-owner to work Mines—Surface Support.—The measure of damage which a land owner sustains by the passage of a railroad over his mineral lands is ascertained the same as in other cases. It is the injury done to the tract as a whole, or the difference between its value at the time of the entry and its value after the completion of the road. *Brown v. Carey*, 43 Pa. St. 495. And in estimating the damages that will be sustained by the construction of the road the jury are not at liberty to estimate the value of unopened mines beneath the surface. Nor is it the subject of damage that the owner will be thereby put to expense and inconvenience when he begins to work his mines. *Searle v. Lackawanna, etc., R. Co.*, 38 Pa. St. 57.

Under the General Railroad Act of New York, a corporation, by proceedings thereunder, does not acquire the fee of the land condemned, but only the right of "use . . . for the purposes of its incorporation during the continuance of its corporate existence." Its acquisitions must therefore be limited to its corporate needs; and an objection to a petition asking for a commission to appraise property needed for the location of a railway, that it specifies only the surface use thereof as that to be acquired,—the description being drawn in that form to avoid the payment for iron ore supposed to be below the surface,—is not well taken. *In re Hartford, etc., R. Co.*, 65 How. Pr. (N. Y.) 133.

Where land is condemned in behalf of a railway company, the decree of condemnation, it seems, vests in the company the title to the earth and minerals found above the grade of the road, and whose excavation is necessary for the construction of the road. Minerals lying below the level of the road, and whose excavation is not necessary in the construction of the road, belong to the owner of the land condemned. *Evans v. Haefner*, 39 Mo. 141.

The reservation of mines and minerals within and under the land includes everything below the surface available for agricultural purposes which can be made useful for any purpose, and includes the right of quarrying, as well as underground mining. *Midland R. Co. v. Checkley*, L. R. 4 Eq. Cas. 19.

A grant of land to a railroad for railroad purposes carries with it the right of support; and although in the conveyance the minerals are reserved, the grantor is not entitled to work them, even under his own land, in any manner calculated to endanger the railway. *Caledonian R. Co. v. Sprot*, 2 Macq. H. L. Cas. 449.

The right of lateral support is held to belong to a bridge of extraordinary weight, against a party who has sold land to a railroad company, although such sale was made as the result of the compulsory power given to the company; and the owner of the adjoining land may be restrained from working mines to the threatened injury of such lateral support. *Northeastern R. Co. v. Elliot*, 30 L. J. Ch. 160; 32 Id. 402.

An act providing for the purchase of lands for railroad purposes, with reservation of the minerals to the owner of the lands so purchased, must be construed to give both lateral and vertical support. *Northeastern R. Co. v. Crossland*, 32 L. J. Ch. 353. The right of such support over mines when the surface is sold for railroad purposes attaches even beyond the limits of the land sold. *Elliot v. Northeastern R. Co.*, 10 H. L. Cas. 393.

A railroad company was empowered by special act to take lands, the act providing for compensation to parties owning lands interfered with. The owner of the surface subsequently, by private sale, without regard to the act, sold the land adjoining his mine to the railroad, reserving the minerals. Afterwards, upon attempting to extend his mine underneath the surface sold, it was found that the railroad interfered with its extension in that direction. But there being no reservation or provision for such inconveniences at the time of the sale of the surface, it was *held* that the owner of the mine was not entitled to damages, and was bound so to work as not to interfere with the road. *Rex v. Leeds, etc., R. Co., 8 A. & E. 686.*

GATES

v.

BOSTON AND NEW YORK AIR LINE R. Co. *et al.*(53 *Connecticut*, 333.)

Where a railroad company is chartered with power to take private property and to construct and operate its road, the authority given is in the first instance permissive merely, and no obligation rests upon the company to exercise the powers granted.

But where the company has taken private property and constructed its road, it has come under an obligation to carry into effect the objects of its charter, and its capital stock, franchises, and property stand charged primarily with this public trust.

Where such a company is empowered to issue bonds and secure them by a mortgage of its franchise and all its property, the mortgagees take the mortgage subject to this trust.

Where such a company fails and the mortgage has to be foreclosed, the legislature has full power to authorize the bondholders, by a vote of a majority, and with an equal opportunity to all, to reorganize as a new corporation, with the rights of the old corporation, such authorized action being merely a mode of securing the performance of the paramount public trust.

And a dissenting minority have no private rights that can be successfully asserted against such action.

Where a mortgage was given to secure a large amount of coupon bonds which were to run twenty years, and contained a provision that they might be considered due by any bondholder on default of interest for six months and that the mortgage might then be foreclosed, it was held that each bondholder took his bond subject to this right of his co-bondholders, and could not, by electing not to have his own bond become due, obstruct the action of the majority.

Where the mortgage is made, under a provision of the charter, to the treasurer of the State, in trust for the bondholders, the treasurer in executing his trust may exercise a wide discretion within the scope of his powers.

And any bondholder, having no notice of the proceedings taken by the treasurer and by the majority of the bondholders with regard to the foreclosure of the mortgage and reorganization of the company, would yet be regarded as a party to them, represented by the trustee and the other bondholders.

There is no reason why, subject to legislative and judicial control, the

majority in interest in common property, indivisible in its nature, consecrated to public use, should not so use the property as to advance the private interests in it and promote the public use.

Surt for an injunction restraining the defendant corporation from ratifying a lease of its road, for the appointment of a receiver and for an account; brought to the Superior Court in Middlesex County, and heard before Phelps, J. Facts found and judgment rendered for the defendants. Appeal by the plaintiff. The case is sufficiently stated in the opinion.

S. L. Warner and S. A. Robinson for appellant.

S. E. Baldwin for appellees.

STODDARD, J.—The New Haven, Middletown & Willimantic R. Co. was chartered by the General Assembly of the State of Connecticut in the year 1867, for the purpose of constructing and operating a railroad from the city of New Haven to the village of Willimantic, and wholly within the territorial limits of this State. By its charter that corporation was invested with all the usual franchises and powers conferred upon railroad companies, including, of course, the right to take private property by the exercise of the right of eminent domain.

The capital stock was \$3,000,000, with the privilege of increasing the same to an amount not more than \$6,000,000.

The company was authorized to borrow money to an amount not exceeding at any one time one half of the amount actually expended for the construction and equipment of its road, and to secure repayment of the same by its bonds with or without coupons. Provision is made in the charter for securing these bonds by the execution of a mortgage of the "railroad and all its property, rights, and franchises" to the treasurer of the State and his successors in office, in trust for the holders of the bonds.

In pursuance of its chartered powers the company proceeded to build its railroad, and in 1869, having obtained stock subscriptions and partially completed the road, issued coupon bonds, either negotiable or not at the option of the holder, to the amount of \$3,000,000, and secured the payment thereof by a mortgage, as provided by the charter. In that mortgage it is recited that the company desired to borrow money "for the purpose of constructing and equipping said railroad," and proposed to make and issue such bonds "pursuant to the power and authority to that effect in said charter contained." The bond itself states that it is secured by a "first mortgage to the treasurer of the State of Connecticut upon the railroad of said company and all its property, rights, and franchises under its charter," and stipulates that, "should any of said interest coupons remain unpaid for six months after presentation and default, the principal sum secured hereby shall, at the option of the holder thereof, become due immediately."

The granting clause of the mortgage also conveyed the railroad, its appurtenances, rolling stock, and all other real and personal property, particularized at length, "which may now belong, or may at any time hereafter belong to said company, and be used as a part of said railroad, or be appurtenant thereto, or necessary for the construction, operation, or security thereof; and also all the property, rights, and franchises of the said company under its charter, and every part thereof, together with the tolls, income, issues, and profits thereof, and all rights to receive the same, and everything necessary for the completion and operation of the road." In the *habendum* clause of the mortgage deed it is provided that the State treasurer in his official capacity is "to have and to hold the said property," etc., "subject to the terms and stipulations of said bonds and the provisions of the said charter under which the said company derives its powers."

Default was made in the payment of the interest, and under the terms of the bond and mortgage more than a majority in value of the bondholders elected that the principal sum should be then due, and at their instance the then treasurer of the State brought his petition in equity to the May term, 1875, of the Superior Court, to obtain a decree of strict foreclosure of the mortgage. Such decree was had, a majority in value of the bondholders and the creditors being parties thereto. A plan of reorganization of the railroad had been proposed by a majority in value of the bondholders, which resulted in the foreclosure, and the passage by the General Assembly of the act incorporating the "Boston & New York Air Line R. Co."

A scheme for the reorganization of the management and ownership of the railroad having been assented to by the parties in interest, was referred to in the foreclosure decree. The time for redemption expired in June, 1875, and the foreclosure thereby became absolute.

On the 8th day of June, 1875, the General Assembly incorporated the new company. The act of incorporation recites that the interest of the bonds remains unpaid since November 1, 1872; that foreclosure proceedings in behalf of the holders of the bonds are pending, etc., and that public convenience and necessity require a considerable further expenditure to complete and equip the road.

The capital stock consisted of forty thousand shares of \$100 each, thirty thousand of which is preferred stock, and ten thousand common stock. The preferred stock is to be issued "only in exchange for the first mortgage bonds of said company, at the rate of five shares for every bond of \$500, and ten shares for each bond of \$1000."

The common stock is to be issued, first, for overdue and unpaid coupons detached from the bonds, and, second, in satisfaction of

certain legal and equitable claims existing against the road prior to the time the decree of foreclosure became absolute. The charter then provided that when a majority of the bonds had been exchanged for the preferred stock, and upon some other conditions, the trustee should convey to the new corporation all his title and interest in the trust property in fee simple, and then provided that such conveyance "shall be effectual to discharge him forever from said trust, and to vest said premises with all the rights and privileges of the old corporation."

The charter then provided that no dividends shall be declared upon the common stock until dividends have been declared out of the net earnings of the railroad upon all of the thirty thousand shares of preferred stock, equal to seven per cent a year thereon from the date of the last coupons on the first mortgage bonds, default on which was made prior to the time when the title of the trustee under the mortgage to the mortgaged premises became absolute by foreclosure. Then it is provided that the new corporation may issue mortgage bonds upon its property, under certain conditions and stipulations, by a vote of three fourths of all the stockholders.

The plaintiff owned, prior to the reorganization scheme, bonds to the value of \$2500, and "has never personally been a party to, or participated in, any of said proceedings, nor authorized any one to act for him or represent him, or been personally served with notice, nor has assented to them, and has not elected to have his bonds due, and still claims them as valid subsisting securities under said original first mortgage. He was not aware that said charter had been granted to the Boston & New York Air Line R. Co., or that said foreclosure decree had been made."

The broad claim is now made by the plaintiff, that, as he was not personally a party to the reorganization scheme, had no actual notice of it, and has not assented that his bonds should mature and the trustee be discharged, therefore his bonds with their coupons are outstanding subsisting obligations of the old corporation, charged upon this railroad property, and that either by an absolute sale, or by operation of the railroad by the trustee, said property and franchises must be appropriated to the discharge of the obligations held by him, notwithstanding that a different mode of appropriating the property in liquidation of the bonds has been agreed upon by a majority of his co-bondholders, and has been sanctioned by the State and by a court of equity having jurisdiction of the subject-matter.

The plaintiff's contention in this behalf rests upon his assumption that he has a constitutional property right to have the property appropriated in the manner claimed by him.

In making this claim the plaintiff ignores, or subordinates to

PLAINTIFF'S
CLAIM.

his own claim, both the private rights of his co-bondholders and public rights vested in trust in the State, while upon every true theory and exposition of his contract the rights of the public are superior to his private rights, and the rights and interests of his co-bondholders are equally with his own to be protected by the law. The plaintiff's argument treats this matter as one of strict legal private right of an individual creditor, against or to private property of an individual debtor, instead of a claim of exceptional character upon property of peculiar nature, in which private rights of others and the right of the public exist, which must be regarded and protected.

RIGHTS OF PUBLIC AND BOND-HOLDERS.

One public right consists in the continuous uses of the railroad, its franchises and corporate property, in the manner and for the purposes contemplated by the terms of the charter. All these corporate franchises and this property are held subject to, and charged with, this obligation.

It is true that the charter is permissive in its terms, and probably no obligation rests upon the corporation to construct the railroad; the option to exercise the right of eminent domain and other public rights is granted. And when that option has been made, and the corporation has located and constructed its line of track, exercising the power of the State in taking property of others, and, in so locating and constructing its road, has invited and obtained subscriptions upon the implied promise to construct and operate its road, has commenced to operate the road under the granted powers, thereby inducing the public to rely, in their personal and business relations, upon that state of affairs; by so accepting and acting upon the chartered powers a contract exists to carry into full effect the objects of the charter, and the capital stock, franchises, and property of the corporation stand charged primarily with this trust. The large sovereign powers given by the State to railroad corporations are granted and exercised only upon the theory that these public rights are to be used to promote the general welfare. Having exercised those powers, the corporation has no right against the will of the State to abandon the enterprise, tear up its track, and sell its rolling stock and other property, and divide the proceeds among the stockholders.

NO OBLIGATION TO CONSTRUCT ROAD. OPERATION WHEN BUILT.

The possible effects of the exercise of such a claimed power are utter disaster to the great interests of the State, certain destruction of private property in which whole communities created and existing upon the faith of the continuous use of the chartered powers are interested, and, indeed, the life of the citizen as well as his property rights are thus jeopardized. Upon principle it would seem plain that railroad property once devoted and essential to public use must remain pledged to that use, so as to carry to full completion the purpose of its creation; and that this public right, existing by reason of the public exigency, demanded by the occa-

sion, and created by the exercise by a private person of the powers of a State, is superior to the property rights of corporations, stockholders, and bondholders.

To this effect also is the weight of authority. In the following cases are illustrations of the general principle: High on *Mandamus*, §§ 315, 316, 317; *State v. Hartford & New Haven R. Co.*, 29 Conn. 538; *R. Commissioners v. Portland & Oxford R. Co.*, 63 Maine, 278; *Attorney-Gen. v. West Wisconsin R. Co.*, 36 Wis. 466; *The People v. Albany & Vermont R. Co.*, 24 N. Y. 261; *The People v. Long Island R. Co.*, 31 Hun, 127; *Attorney-Gen. v. Southern Minnesota R. Co.*, 18 Minn. 40; *In re N. Brunswick & Canada R. Co.*, 1 Pugsley & Burb. (N. B.) 667; *York & North Midland R. Co. v. The Queen*, 1 El. & Bl. 858.

The American and English cases which seemingly doubt these propositions place their conclusion upon the construction of the particular chartered powers and obligations.

In the case at bar there are special provisions of the charter and of the bond and mortgage which indicate an intent to impose this special pro- trust characteristic upon the franchise and property of this corporation. By the charter the corporation was given power to construct and operate the whole intended line of railway, to obtain subscriptions to the capital stock, and to borrow money and issue its bonds, and mortgage its property therefor, for that special object and purpose. The bond on its face purports to be part of an issue secured by mortgage on this railway property and franchises. The mortgage securing the bond recites that the corporation has obtained capital stock subscriptions "for the purpose of constructing and equipping said railroad," states that the corporation desires to borrow money and issue bonds therefor "pursuant to the power and authority to that effect in said charter," covers not only the visible property but the franchise to operate the road, and conveys the property and franchises "subject to the terms and stipulations of said bonds and the provisions of the said charter under which the company derives its power."

It is apparent that the bondholders loaned the money and took their bonds with the security with full notice that the security for the loan was first pledged to the performance of a public trust.

The necessary conclusion is that the State has a right to enforce the continuous exercise of the corporate powers and franchises for public use, to the exhaustion of the value of such property and franchises; and this is true, no matter what private right may embrace the title of the property.

In this State, irrespective of legislative or judicial authority in the special instance, the effect of a foreclosure is to vest absolutely the property of the mortgagor in the mortgagee. It simply cuts off the right of redemption existing in the mortgagor, and thereafter the mortgagee stands with reference to the mortgaged property in the same relation as did the

SPECIAL PRO-
VISIONS OF
TRUST CHARACTER
OF

EFFECT OF FORE-
CLOSURE. TITLE
IN MORTGAGOR.

mortgagor. He has the title of the former owner of the equity, and nothing more. He holds the property subject to all charges, duties, pledges, and equities existing prior to the execution of the mortgage deed. We have not adopted the practice of selling the property upon foreclosure. Necessarily, therefore, if the trust mortgage was rightfully foreclosed, and the title vested in the trustee in trust for the first-mortgage bondholders, the trustee and the beneficiaries of the trust continue to hold the property, subject to the same limitations, duties, and obligations resting upon the original corporation, including of course the obligation to execute the public trust cast upon the mortgaged property by devoting it to the public use for which it was created. This property could not be relieved from this trust without the acquiescence of the State. But the State has explicitly declared the public intent that the franchises and property vested in these bondholders should continue to be devoted to the public use declared in the original charter, and has created a new corporation for that purpose. In the organization, control, and management of this new corporation, and in its property and franchises, the plaintiff is, by the incorporating act, entitled to share proportionally with all the other bondholders. The new corporation is an instrumentality adopted by the State, with the acquiescence of a majority of the bondholders, for carrying into effect the original design, and devoting the property to the only use which the law of its creation permits; and in thus applying the trust property to the object and purposes of the trust, no right of the plaintiff is impaired, so long as he retains his original *pro rata* share in the trust property, subject to the execution of that trust and the expenses necessarily incident thereto.

So too in relation to the other bondholders, it is manifest that each bondholder enters into contract relation with each and all of his co-bondholders. His right to appropriate the security in satisfaction of his bond in such lawful manner as he may choose is modified by the same existent right in every other holder. His absolute right of control is limited not only by the express provisions of the bond and mortgage, but also in great measure by the peculiar nature and character of the security. *Canada Southern R. Co. v. Gebhard*, 109 U. S. Reps. 534, 537. CONTRACTS OF BONDHOLDERS. "To allow a small minority of bondholders, representing a comparatively insignificant amount of the mortgage debt, in the absence of any pretence, even, of fraud or unfairness, to defeat the wishes of such an overwhelming majority of those associated with them in the benefits of their common security, would be to ignore entirely the relation which bondholders secured by a railroad mortgage bear to each other. Railroad mortgages are a peculiar class of securities. The trustee represents the mortgage, and in execut-

ing his trust may exercise his discretion within the scope of his powers. If there are differences of opinion among the bondholders as to what their interests require, it is not improper that he should be governed by the voice of the majority, acting in good faith and without collusion, if what they ask is not inconsistent with the provisions of his trust." *Shaw v. Railroad Co.*, 100 U. S. Reps. 611, 612.

This mortgage security is an entirety; it is indivisible, and there can be but one foreclosure of that mortgage. The bond on its face provides that "should any of the said interest coupons remain unpaid for six months after presentation and default, the principal sum secured hereby shall, at the option of the holder hereof, become due immediately;" and the mortgage has substantially the same provision. A majority of the bondholders exercised such option, and their bonds matured.

A statute authorized the trustee to foreclose the mortgage. That power probably resided in the trustee irrespective of that statute. The law of the place where a contract is made is part of the contract, as if incorporated in terms therein. The holders of these bonds hold them subject to that law. When it was provided in the bond and mortgage that the bonds were payable in twenty years from date, it was also provided by the bond, the mortgage, and the law, that under certain circumstances, at the option of the bondholders and the trustee, the bonds should mature and the mortgage be foreclosed before that time, thus preventing the contemplated running for twenty years. The provision that the bond should continue for twenty years an outstanding subsisting security, if any existed, was with reference to the corporation. The provision that the bonds by the action of the bondholders might mature before that time was in reference to the co-bondholders. And while it would impair the obligation of a contract, if such contract existed, so far as the corporation is concerned, to change the time of maturity, it does not have that effect when the co-bondholders proceed upon their common and undisputed right to cause the bonds to mature, and by foreclosure to discharge the bonds by taking the property in a legal way.

Prima facie the foreclosure of the mortgage security operated to discharge the mortgage indebtedness. The equitable title of the property was in the beneficiaries of the trust. The trustee was not selected because of his personal fitness or qualities; he was a State official, as are also his successors in office, designated by law as matter of convenience and public policy, and not selected by contract of the parties to the mortgage. He had no active duties in relation to the trust except those imposed by statute and the charter. And this charter was open to repeal. In these particulars, the rights of the beneficiaries under the trust to the continu-

ance thereof are very different from the rights existing under an ordinary active trust created by act and contract of the parties.

When the legislative power, which upon grounds of public policy created the trust, upon like grounds willed that such trust should cease, and vested the property, absolutely TRUST VESTED IN BENEFICIARIES. denuded of the trust, in the beneficiaries, at the instance of a majority in value of them, no right of a dissentient beneficiary is affected. The trust does not rest upon contract, and was created with the express reservation that the State might at will terminate it.

The purposes of the trust had been accomplished. The property had been appropriated by the foreclosure, so far as it could be by the parties, to the discharge of the bonds, and the scheme of reorganization provided for the distribution of the trust property among those entitled to it, subject to the duties and obligations to the public originally fixed upon it. This distribution was sanctioned by the judgment of a court of equity having jurisdiction. The effect of these proceedings was to vest in the bondholders all the property and the franchises of the original corporation that could be transferred by judicial proceedings. But the then owners of the corporate property were not a corporation; they were simply an aggregation of common owners; but it is obviously impossible for a numerous body of part owners widely scattered in many jurisdictions, and varying from time to time in the personal composition of that body, to operate a railroad; so it is equally inadmissible as a question of public policy that the attempt should be made. The General Assembly, therefore, provided for the new corporation, the stock of which represented the interest of the owners of the property. This or some similar course must be pursued, and it seems to be suggested in the case of *Sturges v. Knapp*, 31 Verm. 1, cited by the defendants. This was a case where the court regarded the trustees as "selected, doubtless, with reference to their capacity and responsibility for this very contingency both by the corporation and the *cestuis que trust*, and neither of these parties had stipulated to deal directly with the other, but only with the trustees as the responsible party." Page 55. "The trustees seem to have been selected for this very office, among others, of controlling and managing the property in case of forfeiture and surrender, as trustees for the benefit of the *cestuis que trust*, in order to make it available for the payment of the bonds, both interest and principal. This must be so until some organization of the bondholders, and the acquiring of some capacity to act by a majority, or in some such way as to enable them to discharge this new class of duties thrown upon them by the forfeiture of the condition of the mortgage and the surrender of the road with its incidents and fixtures." Pages 56, 57.

To these legislative and judicial proceedings, enactments, and de-

crees the plaintiff was a party represented by the trustee and a majority of his co-bondholders. The interests of all persons are bound by a public act of the legislature acting within the scope of its jurisdiction. And it is manifestly impracticable that provision should be made for actual personal notice to all the bondholders under railroad mortgages of judicial action in reference thereto. The bonds are negotiable, passing by delivery from hand to hand, and scattered, in many instances, to all parts of the civilized world. Power is therefore lodged with the trustee to exercise a wide discretion in reference to the administration of his trust, to apply to the courts for judicial action when deemed for the best interest of the *cestuis que trust*, and to bind them in relation thereto. And the familiar practice in chancery proceedings where it is practically impossible to bring by personal notice all individuals of a numerous class into court, is to proceed with a sufficient number in that interest to properly represent it.

PLAINTIFF
PARTY TO PRO-
CEEDINGS. The designation of a State official as the trustee provides a person uninfluenced by personal considerations, independent of the action or control of any portion of the bondholders, and who may be relied upon to carry into full effect the original design of his trust.

STATE OFFICIAL
AS TRUSTEE. A trust of the character in question can be determined by the decree of a court of equity upon proper occasion, certainly at the request of a majority in interest of the *cestuis que trust*, and, at all events, when fortified by the concurring sovereign will of the State, and when the proportionate interests of all the owners of the property are preserved, and the estate is applied to the use for which it was created, and subject to which it is held at all times and by all persons.

A mortgage is provided for in the scheme of reorganization, to be issued by the new corporation, in the first place to pay or secure the payment of certain sums contracted in operating the road while held in trust, and, in the second, to provide for the future operation of the road by the new corporation.

It results, from the view that we have taken of the contract with the bondholders, that these are objects within the scope of their contract, and that the property is lawfully subjected to this prior mortgage to accomplish these ends.

COMMON AND
PREFERRED
STOCK. So far as the common stock is concerned, it is provided by the charter that no right to a dividend upon this stock is acquired "until dividends have been declared out of the net earnings of said railroad upon all of said thirty thousand shares of preferred stock, equal to seven per cent a year thereon from the date of the last coupons on said first-mortgage bonds, default on which was made prior to the time when the title of the trustee under said mortgage to the mortgaged premises became absolute by

foreclosure." Thus is secured to the holders of the bonds the rate of interest originally contracted for, if the property should earn enough to pay that amount.

A question is made as to the power to lease. It is not necessary to dwell on this subject here; the substance of the matter is disposed of in the case of the town of Middle-
POWER TO
LEASE.
town against the same corporation, a companion case to this, and argued in connection with it. (*Infra.*)

This additional suggestion may be made in this case, that the charter of the first corporation gave the same power to lease this property that is given to the new corporation; and, as has been already stated, upon the foreclosure the franchises and property of the old corporation were taken and held by the plaintiff and his associates, subject to the limitations, restrictions, and chartered powers and regulations as to the performance of public duties that were imposed upon the first corporation; and there are no facts in this case to indicate that the lease in question was not for the best interests of all concerned, both private persons and the public generally. There is no reason why, subject to legislative and judicial control and direction, the majority in interest in common property, of indivisible nature, consecrated to public use, should not so use that property as to advance the private interests in that property and secure the public welfare.

TOWN OF MIDDLETOWN

v.

BOSTON AND NEW YORK AIR LINE R. Co.

(58 *Connecticut*, 351.)

The bondholder of a railroad company were, after foreclosure of a trust mortgage of the road, incorporated as a new company to succeed to all the rights of the old, with a provision that the capital stock should be forty thousand shares, of which thirty thousand should be preferred and ten thousand common stock, and that no dividend should be made on the common stock until after one of seven per cent had been made on the preferred. The charter of the old company gave it power to lease the road to any other connecting company; that of the new company requiring a vote of three fourths for the purpose. *Held*, that the company had power, by a three-fourths vote, to lease the road for ninety-nine years to a connecting road at a fixed annual rental.

And the court refused to set aside such a lease although the entire rental was but four per cent on the preferred stock, and was to go, not to the company, but directly to the preferred stockholders as a percentage on their stock.

By the defendant company's charter the old bondholders were authorized to convert their bonds into its stock. The plaintiff town was a holder of

some of the common stock. *Held*, that it could not, in its suit to set aside the lease, avail itself of the fact that some of the bondholders of the old company had not exchanged their bonds for stock and denied the validity of the organization of the new company; nor of the fact that no provision was made in the lease for the payment of certain creditors of the company.

Injuries to bondholders or creditors can be shown and redressed only when they complain of them.

SUIT for an injunction against the leasing of a railroad; brought to the Superior Court in Middlesex County.

The complaint alleged that the New Haven, Middletown & Willimantic R. Co. was incorporated by the legislature of this State in 1867, with power to construct and operate a railroad between the city of New Haven and the borough of Willimantic, and that it did construct and begin to operate such road; that by its charter the several towns on the line of the proposed road were empowered to aid the company by subscribing for its stock, by advancing money and their bonds to the company, and by guaranteeing its bonds; that the several towns on the route had thus advanced or become obligated for over \$2,000,000 for the company; that the company was authorized to issue three millions of coupon bonds, payable in twenty years, secured by a mortgage to the state treasurer as a trustee for the bondholders of its franchise and all its property, such bonds to become due at the option of any holder on six months' default of payment of any interest coupons; that such bonds were issued and disposed of in the market; that the company made default in its interest and the mortgage was foreclosed by the trustee; that the bondholders, under a resolution of the General Assembly, were immediately after, in 1875, incorporated as a new company by the name of the Boston & New York Air Line R. Co., the present defendants; that by the act of incorporation the stock of the new company was to consist of forty thousand shares of the par value of one hundred dollars each, of which thirty thousand were to be preferred stock and ten thousand to be common stock; that every holder of stock, whether preferred or common, was to be entitled to one vote in the meetings of the company for every share of the stock; that no dividend was to be made on the common stock until one of seven per cent had been made on the preferred from the earnings of the company; that the plaintiff town was the owner of eleven hundred and twenty shares of the common stock and had been so before the transactions to be stated; that the common stock before these transactions had been worth in the market twenty-five dollars a share, making the whole stock held by the plaintiff worth at that time twenty-eight thousand dollars; that the defendant company had in September, 1882, made a preliminary contract for a lease of the road to the New York, New Haven & Hartford R. Co. for ninety-nine years from September 30th, 1882, at an annual rental of \$120,000, and was about at a meeting of the company to ratify and

establish the lease; that this rental was to be paid, not to the defendant company, but to the preferred stockholders directly by a certain percentage on their stock; that there was a large amount of unpaid taxes and other claims on the property not provided for in the contract; that the entire income and resources of the property were thus placed out of the control of the corporation and were appropriated for the benefit of the holders of the preferred stock in fraud of the holders of the common stock, and that the common stock would become worthless if the transaction was carried out; praying for an injunction against the approval and adoption of the lease by the defendant company.

The charter of the New Haven, Middletown & Willimantic R. Co., to all the rights of which the defendant company had succeeded, was annexed to the complaint and made a part of it. By it that company had the right to lease its road to any other railroad company whose road connected with their. By a provision of the charter of the defendant company such lease could be made only upon a vote of three fourths of all the stockholders voting by shares of stock.

A temporary injunction was granted by a judge of the Superior Court and afterwards dissolved, and the lease was executed. The case was thenceforth treated as a suit to set it aside. The defendants demurred to the complaint, assigning the following grounds of demurrer:

1. It is wholly grounded on the alleged invalidity of such a lease as the defendant is about to make, whereas said lease, if made, would be valid.

2. Said complaint alleges that said lease is invalid as against certain third parties, such as creditors of the defendant or owners of bonds of the New Haven, Middletown & Willimantic R. Co., who are not parties to this action; whereas the only question properly arising in this action is whether such lease would be invalid as against the plaintiff.

3. Said charter of the defendant and all its proceedings thereunder, in said complaint alleged, are legal and valid.

4. The plaintiff, being a stockholder of this defendant, cannot in this action question the validity of its organization, or its right to take, hold, and dispose of said railroad.

5. Said complaint states no case calling for an injunction or other equitable relief, as demanded therein.

The court (Pheips, J.) sustained the demurrer and rendered judgment for the defendants. The plaintiff appealed.

S. L. Warner and *A. W. Bacon*, with whom was *S. A. Robinson*, for appellant.

S. E. Baldwin for appellees.

BEARDSLEY, J.—This case comes before this court by appeal

from the judgment of the Superior Court that the complaint is insufficient. The plaintiff alleges, in substance, that it is the owner of eleven hundred and twenty shares of the common stock of the defendant company; that said company is about to lease its railroad to the New York, New Haven & Hartford R. Co. for the term of ninety-nine years, at the annual rental of \$120,000, to be paid by the lessee to the preferred stockholders of the defendant company, in proportion to the amount of stock held by them respectively; praying for an injunction against the proposed lease. A preliminary injunction was issued upon this complaint by the Superior Court, which was afterwards dissolved, and the lease was executed. The plaintiff now seeks to have the same set aside, claiming that it violates its rights as such holder of common stock by depriving it of any participation in the earnings of the defendant company for the period of the lease and rendering its stock of little or no market value.

Whether the defendant has the right to make this lease must of course depend upon the provisions of its charter. If the charter authorizes the lease, the fact, if it be so, that it will reduce or destroy the market value of the plaintiffs stock, cannot defeat the right of the company to make it. The plaintiff, as a stockholder in the defendant company, is subject to all the conditions contained in its charter affecting its relation to the other stockholders as well as to the public. By the defendant's charter the bondholders of the New Haven, Middletown & Willimantic R. Co. were incorporated into a new company, which succeeded to all the property and rights of the old one. The charters of both these companies, and the lease in question, are made part of the plaintiff's complaint. The charter of the New Haven, Middletown & Willimantic R. Co. provided that the company might lease its road to any railroad company with whose road it might intersect. (Sec. 7 of charter.)

The defendant's charter provided that it should not so lease without the approval of three fourths of the stockholders of the company. (Sec. 9 of charter.)

The defendant's charter also provides that the capital stock shall consist of not over forty thousand shares, of which not exceeding thirty thousand shares shall be preferred stock, and not exceeding ten thousand shares shall be common stock (secs. 2 and 3 of charter), and that no dividends shall be declared upon the common stock until dividends have been declared upon all the preferred stock, equal to seven per cent a year thereon. (Sec. 5 of charter.) The shares of stock being of the par value of \$100 each, the rent received will amount to only four per cent upon the preferred stock.

But it is claimed that although there is no restriction in the lan-

POWER TO MAKE
LEASE—PROVI-
SIONS OF CHARTER.

gnage of the charter as to the term for which the company may lease its road, or as to the rent to be received, yet it is unreasonable so to construe it as to enable three fourths of the stockholders to make a lease which deprives the other fourth of any chance for dividends for so long a period, and hence that the lease in question is not a rightful and lawful exercise of the power given by the charter. We see no ground for this claim, especially in view of the fact that leases of railroads are, and from the nature of the case must generally be, made for long terms. Railroads are leased, as they are built, with a view to the advantages to arise in the distant future from the development of population and business in the neighborhood by the facilities for transportation which they afford.

The complaint also charges that by the provisions of the lease the entire resources of the defendant company from which income can be derived are fraudulently appropriated for the benefit of the holders of the preferred stock. This is not a charge of fraudulent conduct or intent in the making of the lease, but only that by its operation the income will be fraudulently appropriated for the benefit of the preferred stockholders. This is simply an allegation that this appropriation of the income will be disastrous to the common stockholders and wrongful; not that the preferred stockholders have acted fraudulently. If the company had the right, as it clearly had by its charter, to make the lease upon a three-fourths vote, the court cannot regard the effect of the lease as wrongful, or in any proper sense fraudulent. *Van Weel v. Winston*, 115 U. S. Reps. 237.

The complaint also charges that certain of the bondholders in the old company have not converted their bonds into stock, and deny the validity of the organization of the new company, and that by the contract of lease no provision is made for the payment of certain creditors of the company. If this be so, we do not see upon what principle the plaintiff can avail himself of it as a ground of relief in this case. Injuries done to bondholders or creditors can only be made apparent and redressed when they complain of them.

The questions arising between the defendant company and a bondholder who claimed that he had not converted his bonds into stock were determined adversely to the bondholder at the present term of this court. *Gates v. Boston & N. York Air Line R. Co.*, 35 Conn. 333.

There is no error in the judgment of the Superior Court.

In this opinion the other judges concurred.

Right of State to Enforce Exercise of Corporate Powers.—See *People v. New York Central R. Co.*, 9 Am. & Eng. R. R. Cas. 1.

Effect of Foreclosure of Mortgage upon Railroad—Reorganization of Road.—See *Farmers' Loan and Trust Co. v. Central R. Co.*, 12 Am. & Eng.

REASONABLE-
NESS OF LEASE.

FRAUDULENT
APPROPRIATION
OF RESOURCES—
PREFERRED
STOCK.

INJURIES TO
OTHER CREDI-
TORS.

R. R. Cas. 461; *State v. Montclair, etc.*, R. Co. 13 Ib. 390; *Cooper v. Corbin*, 18 Ib. 394; *Lake Erie, etc.*, R. Co. v. Griffin, 17 Ib. 235; *Lafayette Co. v. Neeley*, 17 Ib. 242; *Wabash, etc.*, R. Co. v. Central Trust Co., 17 Ib. 254; *N. Y., etc.*, R. Co. v. Vatable, 17 Ib. 268; *Burnham v. Bowen*, 17 Ib. 308; *Farmers' Loan and Trust Co. v. Missouri, etc.*, R. Co., 17 Ib. 314; *Leavenworth Co. v. Chicago, etc.*, R. Co., 22 Ib. 61.

MILLER

v.

GULF, COLORADO AND SANTA FE R. CO.

(*Advances Case, Texas. March 13, 1886.*)

In interpreting obligations or subsidy notes given by citizens to a railroad as an inducement to the latter to build to a certain place, the railroad's charter, with all of its obligations thereunder, are to be considered as entering into and forming a part of the agreement.

A proposition made by a representative of the railroad, that he desired that they should procure for the company the right of way through the town and county and the necessary ground in the city for depot purposes, and also the sum of \$75,000, which he said was but a portion of the extra cost to run the road into town and out again; and also the right-of-way bond which the citizens executed, were to be all considered as entering into and forming an inducement for the contract.

It became the duty of the railroad, under the contract, to survey and establish a route to a point within the city limits within half a mile of the court house, and to select and mark out the necessary grounds for depot purposes, which, when done, devolved the duty upon the citizens to secure, by purchase or condemnation, the titles to the property, and that the company in failing to do this and by running the road around to the north line of the city limits, then deflecting so as to just enter the city limits, and running on that line a few hundred yards, and thence deflecting again out of the limits of the city and running several hundred yards to a point where the company established a depot on a tract of land owned by itself, acting in bad faith with the citizens, and therefore the court declines to enforce the obligations executed as a part of the subsidy.

APPEAL from Galveston County.

F. C. Hume and *Seth Sheppard* for appellants.

Ballinger, Mott & Terry for appellee.

This suit was brought by appellee December 8, 1884, upon two obligations or subsidy notes executed to it by appellants, who are citizens of Belton, Belle county, one of which for \$1000 was executed June 18, 1880, and the other for \$200, June 26, 1880. Similar obligations to the aggregate sum of \$75,000 were executed by the citizens of Belton, payable to appellee at the same time.

The consideration expressed upon the face was "the early construction of the Gulf, Colorado & Santa Fe R. to the town of Belton." The following conditions formed a part of each:

"The condition of this obligation is such that if the Gulf, Colorado & Santa Fe R. is not completed to the town of Belton by March 1, 1881, then this obligation is to become null and void ; otherwise to remain in full force and effect."

About the same time a large number of the citizens of Belton, including those who executed the obligations above mentioned, delivered to appellee a bond in the sum of \$7000, conditioned as follows : "The consideration of this obligation is that if we shall cause to be secured to the Gulf, Colorado & Santa Fe R. Co. all necessary conveyances for the right of way for said company through the county of Bell and town of Belton, in the State of Texas, when demanded by it on any line it may locate that touches the corporate limits of the town of Belton, then this obligation will be null and void ; otherwise to remain in full force and effect, to the extent of all moneys that may be paid out by said company in acquiring said right of way."

In answer to the suit defendants plead as follows :

"1. That the notes were given upon a promise and a consideration contrary to sound public policy.

"2. That the railroad was not completed to Belton by March 1, 1881.

"3. That the execution of the notes was procured through the promise of the company to build its railroad upon a designated route into the town of Belton, and to locate its depot at a point within one half-mile of the court-house therein ; that the town and citizens were ready and willing to donate right of way and necessary depot grounds whenever needed ; that the company, in disregard of its promise and the requirements of the law under which it was built, changed its line and constructed its railroad around the town and established its depot outside its corporate limits, and more than a mile from the court-house.

"4. That the notes were also signed upon full faith in the representation of the company that Belton should remain the terminus of the railroad for two years, and that no rival town should be built near it ; when in fact the company continued its construction rapidly beyond Belton, and also bought land and laid off the town of Temple, near Belton, for the purpose of speculation."

The plaintiff by supplemental petition excepted specially to all that part of the answer after the general denial. There was also a denial that the city of Belton, or its citizens, tendered to the company right of way through the town, and depot grounds ; also, denial that the city or its citizens were ready or able to grant such right of way or depot grounds. Plaintiff also alleged that it would have run its road in the city and would have built its depot within a half-mile of the court-house had the right of way and depot grounds been furnished by the citizens, and that it was still ready to do so upon the same conditions.

The Gulf, Colorado & Santa Fe R. Co. was chartered by special act of the legislature of May 28, 1873, amended February 5, 1875. In the eighth section of the act is the following provision:

"Commencing at city of Galveston, thence northwest on the most direct and practicable route so as to intersect the Galveston, Harrisburg & San Antonio R. on the dividing ridge between the Brazos and San Bernard rivers, thence on an air line, as near as practicable to the town of Brenham, in Washington county; Caldwell, in Burleson county; thence to town of Cameron, in Milam county; thence to the town of Belton, in Bell county; and in the event that the citizens of each town shall donate to said company the necessary right of way for road, switches, and turn-outs through said towns, and sufficient ground for depot purposes, the depot shall be located within half a mile of the court-house in each of said towns."

By June 11, 1880, the company had made such progress in building its road that it had its line under contract to within twelve or fifteen miles southeast of Belton up to a place called the Knobs.

The cause was submitted to the court without a jury, and judgment was rendered for plaintiff.

HARWOOD, S. J.—It is evident the learned trial judge, in interpreting the contract the basis of this suit, considered the appellee's charter, with all of its obligations thereunder, as entering into and forming a part of the agreement made with appellants, and in this we fully concur.

In construing the obligations sued upon, all the facts and circumstances surrounding the parties going to throw any light as to what were the objects and purposes of the contracting parties, should be considered.

The second error assigned is to the effect that the court erred in holding that plaintiffs' railroad was completed to the town of Belton by March 1, 1881, in the sense of the contract, and under the requirements of the law.

The several instruments sued upon, together with indemnity, or right-of-way bond, taken as one transaction and construed in the light of the circumstances surrounding the parties at the time, and construed with reference to the obligations imposed upon appellee by the law under its charter, must determine the right of the appellee to recover in this suit.

Evidently it was the purpose of the parties at the time the obligations sued upon were given that for the consideration of the sum of \$75,000, of which the notes sued upon were a part, and the further consideration of the right of way through the county of Bell and through the town of Belton, the appellee would survey and construct its rail-

APPELLEE'S
RIGHT TO RE-
COVER ON IN-
STRUMENTS.

CONSIDERATION
FOR NOTES.

way to and into the corporate limits of the town; and the necessary grounds for depot purposes being secured and donated by the citizens, the appellee would locate and establish its depot within half a mile of the court-house. This, as was universally understood at the time of the contract, was fixed and required by the charter. This, too, was the fair and unmistakable construction to be put upon the propositions made by Mr. Sealy at the very time this amount was subscribed and promised by appellants.

Copying from the findings of fact made by the trial judge: "Mr. Sealy, in a public speech to the citizens of Bel-
SPEECH OF SEALY.
 ton, on the day this subscription was made, he being a director of the company, and speaking for himself and several other directors who were present, said: 'First, we desire you shall procure for us the right of way along two lines through your town and county, thereby enabling us to choose the most practicable route. Then we shall expect you to procure the necessary ground in your city for depot purposes, and last, though not least, we ask you to donate \$75,000, which is but a portion of the extra cost to run our road into town and out again.'"

The learned trial judge further finds from the evidence: "That soon after the speech of Mr. Sealy subscriptions were commenced; that the appellants, M. E. and S. M. Miller, subscribed
FINDINGS OF TRIAL JUDGE.
 \$1000, and appellant M. E. Miller the further sum of \$200, and that afterwards, in lieu of said subscriptions of \$1000 and \$200, M. E. and S. W. Miller executed and delivered to Walter Gresham, agent of appellee, the two notes sued on in this cause."

"The corporate limits of the town consists of 1280 acres in a perfect square, the court-house being in the middle of the square. Before June 12, 1880, the date of the speech of Mr. Sealy and the date of the subscriptions, two lines had been surveyed by appellee from the then terminus of the road, to and into the corporate limits of the town. One passed within a half-mile of the court-house and the other a little further off, but neither had been definitely selected and adopted by the railroad company as the line selected and adopted as the most practicable route."

The judge from the evidence further finds as follows: "The plaintiff (appellee) thereafter, some time in July, 1880, ran a line on the Birdsedale route into the northeast side of the town to a point not far from the court-house square, and Walter Gresham, as plaintiff's agent, conferred with one or two members of the citizens' committee to know if they would give the right of way through the town on that line, and was informed by said one or two members of the committee that the right of way through that part of the town would cost a greater sum of money than the citizens could afford to raise. The cost of that right of way, with necessary depot grounds, would have been about \$10,000. The

plaintiff thereafter, about the middle of August, permanently located its route through the north part of the town by condemnation, the plaintiff paying about \$500 for the part so condemned, and established depot grounds just outside of the corporate limits, paying for the depot grounds several hundred dollars. . . . The depot and depot grounds are about 300 feet outside of the corporate limits of Belton, and are about 200 or 300 feet over a mile from the court-house, and have so remained from about the middle of August, 1880, to the present time. . . . The road as permanently located and constructed enters the corporate limits about 200 feet west of the northeast corner of the corporate limits of the town, and runs thence westwardly just inside the corporate limits about forty feet inside the corporate limits about 2000 feet, just keeping inside of the corporate limits, and then leaves the corporate limits at a point about 2400 feet west of the northeast corner of the corporate limits, and although there is about 2000 feet of plaintiff's road within the corporate limits, no part of said 2000 is more than fifty feet inside of the northern boundary of the corporate limits. The depot is about 800 yards from the point where the plaintiff's road leaves the corporate limits, and the depot is about 350 yards from the northern boundary line of the corporate limits, and the road makes a very gentle curve all the way from the point where it enters the corporate limits to the depot. The distance from the court-house to the depot is a little over a mile."

In the view we take of the case it can make no difference upon which surveyed route the road was constructed to the corporate limits of the town, because as appears from the testimony the road might have been extended into the corporate limits upon either route, and a depot located within a half-mile of the court-house.

The question to be considered is, did appellee, by running the line on the Birdsedale route into the northeast side of the town to a point not far from the court-house square, and by conferring with one or two members of the citizens' committee, to know if they would give the right of way through the town on that line, comply fully with its obligation growing out of the contract with appellants.

In order to put the citizens at default the appellee should have selected the most practicable route, and surveyed and established it into the town to within half a mile of the court-house, and have selected, surveyed, and marked off the grounds necessary for depot purposes, and then have notified the citizens composing the citizens' committee appointed to secure the right of way and depot grounds, and made, in the language of the right of way bond, "demand" of the same for the purposes stated; not until this was done could the citizens have proceeded to secure by purchase or condemnation the titles to the land.

NO DIFFERENCE
WHICH ROUTE
WAS TAKEN TO
TOWN.

BIRDESDALE
ROUTE.

APPELLEE'S
PROPER COURSE.

Until this was done they could not have known what ground to secure by purchase or legal process; nor had the citizens the power to have instituted proceedings in their own names to condemn the land. It was alone by the railroad company that these proceedings could be instituted.

It is not the only legitimate inference that at the time the obligations sued upon were executed, all parties understood that the company would select its route, cause it to be surveyed, as also the depot grounds, and if the citizens should fail to contract with the owners for its purchase, then the railroad company would institute proceedings for its condemnation, and call upon the citizens to pay whatever damages and costs were thereby incurred. If such was not the understanding why did they require of the citizens the indemnity or right-of-way bond?

Although many other questions have been discussed by counsel we regard this as the turning point in the case.

The plaintiff sues upon certain obligations the meaning of which is perfectly clear, and in reply to the defences set up by the defendants the plaintiff specially denies that the town of Belton or the citizens thereof ever tendered to plaintiff depot grounds and right of way through said town, and specially denies that said citizens were ever willing or able to donate to plaintiff the necessary depot grounds and right of way through said town. If this denial is sustained by the evidence then we see no obstacle in the way of the plaintiff's recovery. For if the citizens of Belton, with a fair opportunity of donating the right of way and depot grounds, failed to do so, then they cannot complain of the action of the company in the premises.

But is this true? There is certainly very little proof of it in the record. The only proof adduced is that some time after the obligations had been signed the agent of the plaintiff conferred with one or two of the citizens' committee, who expressed the opinion that the people were not able to bear the expense of locating the track and depot so near the centre of the town, inasmuch as it would cost about \$10,000.

This evidence of the inability of the people of Belton to furnish the depot grounds, etc., seems to us extremely feeble. Such evidence of inability certainly did not satisfy the sagacious and skilful agents of the company when they were getting up the \$75,000 subsidy and right-of-way bond "to the corporate limits." In that case the company's interests were concerned; hence these, its agents, were not satisfied with the opinions of one or two men or of twenty men, that the people would pay the sum demanded. So far from it, they required notes and bonds drawn with all the strictness that ingenuity could devise, with the "utmost strictness of the letter that killeth." But when the papers were signed and the people were bound, the time came when the duties

of the company and the interests of the people who had undertaken so much were to be considered; it was then that the company's agents, upon the slightest supposition of one or two persons, disregarded the rights and interests of the citizens and located its track and depot to suit its own pleasure.

We are led to these conclusions by the testimony of the plaintiff's own witnesses. They do not disguise the fact—
PLAINTIFF'S WITNESSES. indeed they distinctly express it—that their chief object, next to getting the subscription to the subsidy, was to keep the people in the dark as to the locating of the road and the depot. One of their witnesses, Mr. Wallis, states that they went there cautioned to avoid giving information on that subject. It is clear, too, he obeyed fully his instructions, although it taxed his ingenuity to ward off the inquiries of the people on that subject.

This witness also states: "We understood from the people of Belton that they were unanimous in giving the necessary depot grounds and right of way. That was part of the contract, and they were anxious for it. There was nothing to cause us to fear they would not do it. There was quite a warm feeling for the road, and a disposition to do anything required of them."

He also says: "Mr. Sealy, Mr. Gresham, and myself were the committee authorized to go and make representations to the town of Belton and make a contract with them," and that the road had to abide by whatever they did. This witness also says that he told Mr. Burr, one of the Belton citizens, that "we would comply with our part of the contract and run through the corporate limits of Belton," and being asked by counsel, "Do you call it running through the corporate limits by dipping in on one side and making a curve and running out on the same side," said: "Yes, sir; we agree to put it through the city limits, and we did so." He also says: "We knew that when our road went to a town, in order to force us to go through the town the people had to give us depot grounds and right of way," and that they were not deterred in locating the right of way through the town and placing the depot grounds in the town by their refusal to give it.

Being asked, "You were all satisfied that they had the money in Belton to furnish the right of way and depot grounds wherever you desired it," said: "Yes, we thought they would comply with their part of it."

Another witness, Mr. Gresham, says that his chief business was to keep silent; or, as he expressed it, "to play mum," and ward off inquiry. All this time both witnesses saw that the people of Belton were deceived; or, as they expressed it, were "deceiving themselves." But they seem to have thought that their duty to the company required them not to undeceive the people, but rather to encourage the deception—

"To keep the word of promise to the ear,
But break it to the hope."

The testimony of the witness Wallis, to the effect that the directors who went to Belton had been cautioned to communicate nothing about the location of the route and depot, is very suggestive when considered in connection with the condition found in the right-of-way bond, and when considered with reference to the map showing the actual location of the track and depot on the ground.

The bond reads thus: "The condition of this bond is such that if we shall cause to be secured to the Gulf, Colorado & Santa Fe R. Co. all necessary conveyances for right of way for said company, through the county of Bell and town of Belton, etc., when demanded by it, on any line it may locate that touches the corporate limits of the town of Belton," etc. The form of the bond and also the notes, as appears from the testimony, had been agreed upon before they came to Belton.

Now, the route actually located and built upon did not enter the town upon either of the lines along which the people had secured the right of way. But running some distance above the Birdsedale route, it passed north of the north-east corner of the town tract; then, in order to touch the corporate limits, it deflected a little south, or, as the trial judge states it in his findings of facts, "very gently curves to the south," until it crosses, touches the corporate limits, and then running along just inside the corporate limits for a few hundred yards it "very gently curves to the north," and passes without the city limits to a tract of land 350 yards north of the corporate limits, owned by the company.

The plaintiffs having obtained the obligations sued upon by the means herein stated, this court is asked to enforce their collection. This we cannot do, because in our opinion there was in the whole transaction a want of that good faith and fair dealing which the makers of these obligations had good right to expect and demand of the company.

This cause having been tried before the court without a jury, it is ordered that the judgment be reversed, and that such judgment be rendered in this court as should have been rendered below; that is, that judgment be rendered for the appellants.

Reversed and remanded.

FARMERS' LOAN AND TRUST Co., Trustee,

v.

CHICAGO AND ATLANTIC R. Co. *et al.*

(*Advance Case, U. S. C. C., D. Indiana. April 8, 1886.*)

A trust, valid at its inception, is never permitted to fail for lack of a trustee; e.g., a conveyance in trust to two, one capable of taking and one not, will not become invalid by reason of the death of the competent trustee.

A citizen of the United States has the right to hold real and personal property, absolutely, or in trust for his own benefit, or in trust for the benefit of himself and others, in any State of the Union. So held *arguendo*.

A State statute which declares a conveyance in trust of real or personal property to a non-resident, except by will, invalid, is void as to citizens of the United States, as inconsistent with the Constitution, art. 4, § 2, cl. 1, which provides that "the citizens of each State shall be entitled to all the privileges and immunities of citizens in the several States." So held *arguendo*.

A State statute which declares a conveyance in trust of real or personal property to other than "a *bona-fide* resident" of the State invalid, and which provides that a trustee's right shall cease upon his removal from the State, held, in view of surrounding facts, not to govern a conveyance in trust to a foreign corporation of property within the State.

Provisions in a trust deed made by a railway corporation to secure its bondholders, which prohibit the trustee, without the consent of the holders of a majority of the bonds, to declare the principal due before maturity, to take possession of the mortgaged property, operate or sell it, or to maintain a foreclosure suit for the principal before the maturity of the bonds, do not abrogate the right of the trustee, at the request of a single bondholder, or the right of a single bondholder himself, if the trustee refuses to act, to foreclose, upon breach of the condition of the deed by the corporation's failure to pay interest.

In a suit by a trustee suing for the benefit of bondholders to foreclose a trust deed against a railway corporation to enforce the payment of overdue interest, complainant, unless restrained by the trust deed, is entitled to a decree nisi for the amount due and for a sale of the mortgaged property upon default in payment. Upon payment of the amount due, the foreclosure decree will be suspended until default again occurs in the payment of interest.

The appointment of a receiver rests in the sound discretion of the court. Defendant's insolvency may or may not be cause for appointing receiver.

In equity.

B. H. Bristow, J. E. McDonald, H. B. Turner, and C. N. Steele for complainant.

J. H. Choate, J. J. McCook, Charles L. Atterbury, Edward Daniels, C. W. Fairbanks, and Jacob S. Slick for defendants.

GRESHAM, J.—The Chicago & Atlantic R. Co., on the thirteenth of June, 1881, by its deed of trust, conveyed to the Farmers' Loan

& Trust Co., a New York corporation, and Conrad Baker, a resident and citizen of Indiana, its line of railway extending from Marion, Ohio, to Chicago, together with all other property of every character which it then owned or might thereafter acquire, to secure an issue of 6500 bonds of \$1000 each, payable on November 1, 1920, with interest at six per cent per annum, payable semi-annually on the first days of May and November. On the fifteenth day of September, 1883, the railway company, by a second trust deed, conveyed the same property to the Farmers' Loan & Trust Co. and George J. Bippus, a citizen of Indiana, to secure an additional issue of 5000 bonds of \$1000 each, payable on the first day of August, 1923, with interest at the rate of six per cent per annum, payable semi-annually on the first days of February and August. This suit is brought by the Farmers' Loan & Trust Co. against the Chicago & Atlantic R. Co. and George J. Bippus, the co-trustee in the second mortgage; Conrad Baker, the co-trustee in the first mortgage, being dead.

Section 2988 of the Revised Statutes of Indiana, which was in force when the trust deeds were executed, provides that "it shall be unlawful for any person, association, or corporation to nominate or appoint any person a trustee in any deed, mortgage, or other instrument in writing (except wills), for any purpose whatever, who shall not be at the time a *bona-fide* resident of the State of Indiana; and it shall be unlawful for any person who is not a *bona-fide* resident of the State to act as such trustee. And if any person, after his appointment as such trustee, shall remove from the State, then his rights, powers, and duties as such trustee shall cease, and the proper court shall appoint his successor, pursuant to the act to which this is supplemental."

It is urged that inasmuch as the Farmers' Loan & Trust Co. is a New York corporation it was not capable, under this statute, of acting as trustee in the trust deed or mortgage, and that it cannot, therefore, maintain this suit. The Chicago & Atlantic Co. conveyed its property in trust to secure its bonds, and it would not, perhaps, as between itself and the bondholders, be permitted to urge this objection against the validity of its own solemn act. Gov. Baker, the co-trustee, who died before the suit was brought, and whose successor in the trust has not been appointed, was a resident of Indiana when the trust deed was executed. This satisfied the requirements of the Indiana statute. No court would be expected to hold that the trust deed was void because one of the trustees was not a resident of Indiana. If it be true that the Farmers' Loan & Trust Co. was not capable of acting as trustee to the extent of taking title to so much of the mortgaged property as was situated within the State, or that its designation as trustee was to that extent inoperative and void, nevertheless the trust deed was valid when executed, and a trust is

FACTS.

TRUSTEES—IN-
DIANA STATUTE.FARMERS' LOAN
AND TRUST CO.
AS TRUSTEE.

never permitted to fail for want of a trustee. The trust property was conveyed as an entirety to secure the payment of the bonds and coupons, and it is not claimed that the Farmers' Loan & Trust Co. was incapable of acting as trustee so far as the trust embraced property within the States of Ohio and Illinois. Suits between the same parties, asking the same relief, commonly called "ancillary" suits, may be, and presumably have been, instituted in the Circuit Court of the United States for the Northern District of Ohio and the Northern District of Illinois, and the court in either of those jurisdictions would have authority to decree a sale of the mortgaged property as an entirety. *Muller v. Dows*, 94 U. S. 444.

If, under such circumstances, a court of equity has authority to allow the requesting coupon-holders to be made co complainants with the Farmers' Loan & Trust Co., it would be expected to exercise it instead of dismissing the bill. The facts of this case would perhaps justify the exercise of that authority. But if the Chicago & Atlantic Co. be not estopped from denying that the Farmers' Loan & Trust Co. was capable of acting as trustee, and if the court is not authorized to allow the coupon-holders, at whose request the suit was brought, to be substituted as complainants or made co-complainants with the Farmers' Loan & Trust Co., the bill must be dismissed, unless the statute relied on is invalid.

It will be observed that this statute does not prohibit foreign corporations from doing business in this State. Obviously that was not the design of the legislature. It is a statute **CONSTRUCTION OF INDIANA STATUTE.** which denies to residents of other States the right to take and hold in trust, otherwise than by last will and testament, real and personal property in Indiana. The right is asserted to deny to persons, associations, or corporations, within or without the State, power to convey to any person in trust, not a resident of Indiana, real or personal property within the State. This is a plain discrimination against the residents of other States. If Indiana may disqualify a resident of another State from acting as trustee in a trust deed or mortgage which conveys real or personal property as security for a debt due to himself alone, or for debts due himself and other creditors, it would seem that the State might prohibit citizens of other States from holding property within the State, and to that extent from doing business within the State. No State can do the latter. A person may, and frequently does, acquire a property interest by a conveyance to him in trust. A citizen of the United States cannot be denied the right to take and hold absolutely real or personal property in any State of the Union, nor can he be denied the right to accept the conveyance of such property in trust for his sole benefit, or for the benefit of himself and others. This right is incident to national citizenship.

Section 2 of article 4 of the Constitution of the United States declares that "the citizens of each State shall be entitled to all the

privileges and immunities of citizens in the several States." "Attempt will not be made," say the Supreme Court of the United States in *Ward v. Maryland*, 12 Wall. 418, "to define the words 'privileges and immunities,' or to specify the rights which they are intended to secure and protect, beyond what may be necessary to the decision of the case before the court. Beyond doubt, those words are words of very comprehensive meaning; but it will be sufficient to say that the clause plainly and unmistakably secures and protects the right of a citizen of one State to pass into any other State of the Union for the purpose of engaging in lawful commerce, trade, or business, without molestation; to acquire personal property; to take and hold real estate. . . ."

But it may be said that the word "person," as used in the statute, includes artificial as well as natural persons, and that the statute is capable of enforcement as against corporations only. A careful reading of the act will show that it is not capable of such construction. The latter clause of the section says: "If any person, after his appointment as such trustee, shall remove from the State, his right as trustee shall cease." A domestic corporation cannot remove from the State; and if the words "a foreign corporation" be read into the statute, they are qualified by the words "*bona-fide* resident," and it is plain that a foreign corporation cannot become a "*bona-fide* resident" of a State which does not create it. A corporation is a mere creation of local law, having no legal existence beyond the sovereignty where created. It dwells in the place of its creation and cannot migrate. *Paul v. Virginia*, 8 Wall. 168. How, then, can a corporation of another State become a "*bona-fide* resident of Indiana? It is true that the existence of a corporation may be and frequently is recognized abroad by the enforcement of its contracts made abroad as well as at the place of its domicile, and in other ways; but that is done purely upon considerations of comity.

In March, 1879, a statute was enacted by the legislature of Indiana which declared that if any foreign corporation brought a suit in the federal courts for the district of Indiana, or removed a suit pending in a court of the State to such federal courts, it should thereby forfeit its right to transact business in the State, and be prohibited from thereafter transacting any business therein. The passage of this act sufficiently accounts for the phraseology of the statute relied on in this suit. Having gone as far as the legislature deemed it necessary to go in the enactment of the statute of March, 1879, it was doubtless thought unnecessary to make this act, which was passed two months later, apply to foreign corporations as well as natural persons. In enacting the latter statute, the legislature no doubt deemed the former one sufficient to deter any person, association, or corporation from appointing a foreign corporation to act as trustee

ACT OF MARCH,
1879, FARMERS'
L. & T. CO.
CAPABLE OF ACT-
ING AS TRUSTEE.

in any deed or mortgage, and that additional legislation was necessary only to prevent the appointment or designation of natural persons to act as such trustees. The Farmers' Loan & Trust Co. was therefore capable of accepting the conveyance as trustee, and of acting as such, notwithstanding the State statute.

In the resolution of the board of directors which authorized the issuance of the bonds, and the execution of the trust deed or mortgage to secure them, it was declared that the security should be for the payment of both principal and interest, and it was directed that proper provisions should be inserted in the trust deed or mortgage to secure to the holders of the bonds payment of principal and interest according to their tenor. It was declared in the trust deed or mortgage that it should be a security for the payment of the bonds, with the interest maturing thereon ratably, and without discrimination, according to their tenor and effect; that the trustees should hold the property so conveyed to them for the benefit, security, and protection of persons and corporations, firms and partnerships, who should hold the bonds and interest warrants, or any of them, and for the purpose of enforcing the payment thereof; that until default should be made in any portion of the interest or principal of the bonds, or any of them, or in any other requirement, the railroad company should continue in possession, control, and management of the mortgaged property, with the right to receive and use the tolls, income, and profits therefrom; that upon default in the payment of the interest or principal of any of the bonds, and such default continuing for six months after maturity and demand of payment, at the request in writing of the holders of at least a majority of the bonds then owing and outstanding, the trustees might and should take possession of the mortgaged property, and operate the same until the net receipts or earnings should enable them to pay the overdue interest, after which possession of the mortgaged property should be restored to the railroad company: provided, however, that if the holders of at least a majority of the outstanding bonds should elect and notify the trustees in writing, before the interest in default should be paid, that they (the bondholders) desired the principal of the outstanding bonds to become due, then, in that event, the trustees, instead of surrendering the mortgaged property to the railroad company, should retain possession of the same, and apply the earnings, and any surplus which might remain in their hands, to the satisfaction of the interest and principal of the outstanding bonds ratably, and without discrimination or preference, and the trustees should operate and manage the railroad until the outstanding bonds and interest should be paid in full. It was further declared in the trust deed that in case of default in the payment of the interest and principal of any of the bonds, either by their terms or under the conditions above stated, it should be lawful for the trustees, after entry,

PROVISIONS OF
TRUST DEED.

or without entry, upon the written request of at least a majority of the holders of the bonds then outstanding, to sell and dispose of the mortgaged premises.

Article 4 of the trust deed reads as follows:

"The party of the first part covenants and agrees to and with the party of the second part, and their successors in said trust, and to and with each person or persons who shall or may become holder or holders of any of the said bonds, their heirs, executors, administrators, and assigns, jointly and severally, that in case of default in the payment of the interest or principal of any of said bonds, and such default continuing for the space of six months after maturity and demand of payment, and the principal of said bonds shall have become due, either by the terms thereof or at the election of the bondholders as aforesaid; or in case of default in the performance in any of the other covenants or conditions herein contained on the part of the party of the first part, and such default continuing for the space of six months after notice is given in writing by the parties of the second part, or their successors in said trust, or by a holder of any of said bonds to perform the same,—then, at the request in writing of the holders of at least a majority of the bonds then owing and outstanding, the parties of the second part, or their successors in said trust, after entry as aforesaid, or without entry, may or shall foreclose the equity of redemption of the party of the first part, and of all other persons having any legal or equitable rights or claims against or in or to the mortgaged premises or any part or portion thereof, by proceedings at law, or in equity, in any court of competent jurisdiction, whether of the States through which the said road may run or of the United States; and it is hereby expressly understood and agreed that upon proper indemnity to the trustees a majority in interest of the holders of the bonds secured hereby shall, from time to time, have a right to direct and control the proceedings for the foreclosure of this mortgage."

The Chicago & Atlantic Co. has paid no interest on either class of bonds. The Erie Co. paid out \$584,850 in taking up first-mortgage coupons which became due prior to November 1, 1884. All the interest that became due under the first mortgage on and subsequent to the last-named date remains unpaid. Including the coupons taken up by the Erie Co., the interest due on the first mortgage bonds is \$1,669,850. The coupons which became due on November 1, 1884, and May 1, 1885, had remained unpaid for six months after maturity and demand before this suit was brought. It was brought at the request of the owners of past-due coupons, after payment had been demanded and refused, and against the wish and protest of the holders of a majority of the bonds, who in open court moved that the suit be dismissed.

It is contended that no action can be taken by the trustees look-

ing to the foreclosure of the mortgage or the appointment of a receiver without the written request or direction of the holders of at least a majority of the bonds, such consent or request being the basis of all action for the enforcement of the trust; and that no right of action exists or can exist in favor of any one to enforce the lien of the mortgage for interest only. Under the provisions of the trust deed, without the direction or consent of the holders of a majority of the bonds the trustee cannot take possession of the mortgaged property, or declare the principal due before maturity, according to the terms of the bonds, nor without such consent can the trustee operate or sell the property, or commence proceedings to foreclose the principal before maturity, in 1920. It does not follow, however, that because this power is given to the holder of a majority of the bonds the trustee at the request of a minority, or even of a single bondholder, may not commence proceedings to foreclose for the non-payment of interest; or if on proper demand the trustee refuses to bring suit, that a minority or even a single bondholder may not sue. Failure to pay a single instalment of interest is a breach of the conditions of the trust deed.

TRUSTEE
PROCEED
FORECLOSE.

MAY
TO

The Chicago & Atlantic Co. agreed to pay interest on each bond, and it conveyed its property to trustees "for the benefit, security, and protection of the persons and corporations, firms and partnerships who should hold the bonds and interest warrants aforesaid, or any of them, for the purpose of enforcing payment thereof according to their tenor and effect." The power of a majority to control proceedings to foreclose for the payment of principal when it shall become due, at the election of a majority, before maturity in 1920, is not exclusive of the right which a single bondholder has to enforce the security for the non-payment of any instalment of interest on any bond. This right of a minority, or even a single bondholder, does not depend upon the consent of a majority. If it did, the company might refuse to pay interest on the bonds held by a minority until maturity according to their terms, and even after that time, if some of the counsel for the defendant are correct in their position that neither before nor after maturity can the trust be enforced without the consent of at least a majority. The right which is asserted by the majority must be found in plain and explicit terms in the mortgage or it will not be recognized. It cannot exist by mere implication.

POWER OF MA-
JORITY NOT EX-
CLUSIVE.

It is true that in article 4 of the mortgage it is declared "that, upon indemnity to the trustees, a majority in interest of the holders of the bonds secured hereby shall, from time to time, have a right to control the proceedings for a foreclosure of this mortgage." The proceedings here referred to are the proceedings to enforce the trust for the payment of principal which shall

become due, under the provisions of the mortgage, at the election of the holders of a majority of the bonds before maturity according to their terms. The right is given to control *the* proceedings for a foreclosure, not *all* proceedings for a foreclosure.

Chicago, D. & V. R. Co. v. Fosdick, 106 U. S. 47; s. c., 7 Am. & Eng. R. R. Cas. 427, was a suit to foreclose a mortgage or trust deed executed by the railroad company to secure both principal and interest of an issue of bonds. The mortgage provided that if any interest should be permitted to continue in default after presentment and demand of payment, the trustees might declare the principal of all the bonds immediately due and payable, and notify the company thereof; and that, upon the written request of the holders of a majority of the bonds, the trustees should proceed to collect the principal and interest of all the bonds by foreclosure and sale, or otherwise, as provided in the mortgage. There was default in the payment of coupons that fell due on October 1, 1873, but a majority of the bondholders thereafter funded these coupons; the coupons not funded, however, continuing unpaid for more than six months. The circuit court decreed that the entire debt, both principal and interest, was due, and ordered the mortgaged property sold unless payment should be made within twenty days. It was held, Justice Matthews delivering the opinion of the court, that although the principal of the bonds was not shown to be due, it plainly appeared that interest upon a minority of them was in default; that the record failed to show that any of the coupons not afterwards funded had been presented and payment thereof refused; and that a written request from a majority of the holders of the bonds to the trustees was necessary to authorize them to declare the principal due, and institute proceedings for its collection, and no such request appeared. In speaking of the right to maintain the suit for non-payment of interest, the court said:

“But inasmuch as by the terms of the first article the conveyance was declared to be for the purpose of securing the payment of the interest as well as the principal of the bonds, and by the fourth article the mortgagor’s right of possession terminated upon a default in the payment of interest as well as the principal of any of the bonds, we are of opinion that, independently of the provisions of the other articles, the trustees, or, on their failure to do so, any bondholder, on non-payment of any instalment of interest on any bond, might file a bill for the enforcement of the security by the foreclosure of the mortgage and sale of the mortgaged property. This right belongs to each bondholder separately, and its exercise is not dependent upon the co-operation or consent of any of the others or any of the trustees. It is properly and strictly enforceable by and in the name of the latter, but, if necessary, may be prosecuted without, and even against, them. It follows from

the nature of the security, and arises upon its face, unless restrained by its terms."

The complainant is entitled to a decree *nisi*, ascertaining the amount due upon the coupons which are not held by the resisting bondholders, and if the amount, when ascertained, is not paid within a reasonable time, to be fixed by the court, the complainant, for the benefit of those whom it represents in this suit, will be entitled to a decree for the sale of the mortgaged property, barring all rights subordinate to the mortgage. The demurrer to the bill is overruled.

The motion for the appointment of a receiver remains to be determined.

The Erie road extended from New York to Salamanca, and the New York, Pennsylvania & Ohio road, which had been leased by

the Erie Co., extended from the latter place to Marion, Ohio. Hugh J. Jewett was then president of the

HISTORY OF CHICAGO AND ATLANTIC R. CO.

Erie Co., and he, and others associated with him, realizing the importance to that company of owning or controlling a through line from the city of New York to Chicago, which would enable the Erie Co. to compete with other through lines for western business, caused the Chicago & Atlantic Co. to be organized, and its road built. The road of the latter company was built to be operated as a part of the Erie line, and in the interest of that company. About the time the first mortgage was executed the Erie Co., the Chicago & Atlantic Co., and other companies, as well as certain individuals, entered into contracts providing for the construction and operation of the new road as the western extension of the Erie line; for the negotiation of the first-mortgage bonds; and for advancements to be made by the Erie Co. to pay the interest on those bonds; and for other purposes. The Erie Co. agreed that it would advance money to complete the road should the proceeds of the bonds and the subsidies collected prove inadequate for that purpose; that it would advance money to pay interest accruing on the bonds previous to the completion of the road; and that "from its own gross earnings derived from all business passing from and to the Chicago & Atlantic Co., to the extent of such gross earnings received during the fiscal year in which any instalment of interest on the bonds shall fall due, make good any deficiency in the net earnings of the Chicago & Atlantic necessary for the payment of such instalment of interest on said first-mortgage bonds." The Chicago & Atlantic Co. agreed that it would, after paying interest on its first-mortgage bonds out of its gross earnings, reimburse the Erie Co. out of such gross earnings for advancements made by that company to complete the new road, and to pay interest on the first-mortgage bonds, and that the Erie Co. should have a lien on the net earnings for such advancements in the order named. Besides what was realized from the

sale of the first-mortgage bonds and subsidies,—the latter amount being inconsiderable,—the Erie Co. advanced all the money that was used in the construction of the Chicago & Atlantic's road, and all interest which is not in default has been paid by that company. It was also agreed that the Chicago & Atlantic Co. should deliver to the Erie Co. at Marion, all freight and passengers which it could control, destined to points reached by the Erie Co., and in return that the latter company should deliver to the Chicago & Atlantic Co., so far as it could control the same, an amount of west-bound traffic which should bear to the whole amount of the Erie Co.'s west-bound traffic for Chicago and points beyond the same proportion that the amount of east-bound traffic received by it from the Chicago & Atlantic Co. would bear to the whole amount of the Erie Co.'s east-bound traffic. It was also agreed that Hugh J. Jewett should hold ninety per centum of the capital stock of the Chicago & Atlantic Co., as trustee, with irrevocable power to vote the same until all moneys advanced by the Erie Co. to the Chicago & Atlantic Co. should be repaid, and until the principal and interest of the first-mortgage bonds should be fully paid.

The Chicago & Atlantic Co. was never able to pay operating expenses and interest on its bonds. Being in want of money and embarrassed, that company, in July, 1883, entered into a further agreement with the Erie Co. By this agreement it was provided that the latter company should make additional advances to the Chicago & Atlantic Co., which should make a second mortgage upon its property and franchises to secure an additional issue of bonds amounting to \$5,000,000, to be placed in the hands of Mr. Jewett, as trustee, to be held as collateral security for advances of money made, and to be made, with authority, as such trustee, to pledge or sell the bonds. The bonds and mortgage were executed. Prior to this time the Erie Co. had advanced to the Chicago & Atlantic Co. more than \$1,500,000, and the Erie Co. claims to have made further advances after the second-mortgage bonds were placed in Mr. Jewett's hands as trustee. Mr. Jewett borrowed \$1,500,000 from Grant & Ward, which the Erie Co. received and credited upon the account of the Chicago & Atlantic Co. This loan was secured by a deposit by Mr. Jewett of \$2,500,000 of the second-mortgage bonds. Notes made payable to Grant & Ward by the Chicago & Atlantic Co., and indorsed by the Erie Co., amounting to \$1,500,000, were delivered to Grant & Ward at the same time. It was the understanding, however, between Grant & Ward and the two companies that these notes were to be held and used as memorandum notes, and not otherwise. Before failing in May, 1884, Grant & Ward pledged both the notes and the bonds to various banks and individuals as collateral security for loans, the pledgees being ignorant of the arrangement under which Grant &

Ward received the notes and bonds. The Chicago & Atlantic Co. failed to take up any of these notes or bonds, and in order to protect its credit as indorser the Erie Co. was obliged to pay over a million dollars on the notes, and in doing so it obtained possession of 761 of the second-mortgage bonds. It follows that to the extent that the Erie Co. took up the notes which it had indorsed, the indebtedness of the Chicago & Atlantic Co. was not reduced.

Since Mr. Jewett ceased to be president of the Erie Co. he has claimed that the stock of the Chicago & Atlantic Co. was deposited with him, not as president of the Erie Co., but as a personal trust, and he now insists that he has the irrevocable right, as such trustee, to vote the stock, and thereby maintain control of the Chicago & Atlantic Co., without regard to the wishes of the Erie Co. The holders of the first-mortgage bonds, who claim the right to control these proceedings, are acting in concert with Mr. Jewett.

The facts abundantly show that he was made trustee to hold the stock of the Chicago & Atlantic Co., with authority to vote it, because he was president of the Erie Co., and could be relied upon to control and manage the Chicago & Atlantic road as the western extension of the Erie line. If the Erie Co. was expected to advance money to complete the construction of the new road, and to pay interest on the bonds, and thus take care of the credit of the Chicago & Atlantic Co., it was not unreasonable it should, in some way, be protected against unfriendly management of the new road. The Erie Co.'s stockholders and creditors no doubt thought the placing of the stock in Mr. Jewett's hands would afford them ample protection. It was provided in the contract which designated Mr. Jewett as trustee, that in the event of his death or resignation, the trust should devolve upon such person as he might have previously designated to succeed him, and in default of such designation that the trust should devolve upon such person as the Erie Co. might designate.

This language plainly indicates that Mr. Jewett was authorized to act as trustee, with power to vote the stock, because he was president of the Erie Co., and as such would see to it that the Chicago & Atlantic road was operated as a part of the Erie line. His present position as to his powers and duties as trustee are inconsistent with the views which he entertained while president of the Erie Co. In his annual report to the stockholders of that company in 1882 he said:

"To secure the construction of the road, and its future management to the satisfaction of the parties proposing to purchase the bonds, it was agreed that the entire proceeds thereof, together with certain subsidies which had been voted by the townships along the line, should be deposited with the president of the New York, Lake Erie & Western R. Co., in trust, and the duty was de-

volved upon him of seeing to the proper application thereof to the construction of the road. It was further stipulated that ninety per cent of the stock should also be deposited with him, with irrevocable proxy to vote thereon during the life of the bonds (thirty years from the date thereof), thereby securing to your company the absolute control of the road for such period. . . . By this means your company secures access to the business and markets of Chicago by a line of road as much under its control as though it had advanced all the money needed for its construction, and assumed all the obligations incident to its maintenance and operation."

Mr. Jewett now says that the stock was not deposited with him, as president of the Erie Co., with irrevocable power to vote the same as such president during the life of the bonds, and that it was not the intention that the Erie Co. should thereby secure the absolute control of the new road for that period.

The court cannot be expected, at this stage of the litigation, to pass upon the validity of the contracts already referred to, or to determine the rights, duties, and liabilities of the parties thereto. Although the two companies are natural allies, and their roads should be operated as a single line, there is little hope of harmonious action until a change occurs in the management of one or both. Each accuses the other of violating contract obligations. Mr. Jewett controls the action of the Chicago & Atlantic Co., and that he is unfriendly and even hostile to the Erie Co., under its present management, admits of no doubt. It is claimed by him, and the holders of a large majority of the bonds who are acting in concert with him, that, without any change in the Chicago & Atlantic Co.'s management, the Erie Co. should be required to pay the interest accrued and to accrue on the first-mortgage bonds. The Erie Co. appears to have advanced to the Chicago & Atlantic Co., from time to time, over \$2,000,000, the main consideration for which was the agreement that the latter's road should be operated as the western extension of the Erie line, and the only security that was given for these large advances was the pledge of the second-mortgage bonds. The facts thus far brought to the attention of the court do not justify the assertion that since Mr. Jewett ceased to be president of the Erie Co. its violations of the traffic contract have reduced the earnings of the Chicago & Atlantic Co. equal in amount to the latter's indebtedness to the former. The Chicago & Atlantic road was first operated for through business three years ago. It is not denied that it failed to pay operating expenses the first and second years. The statements submitted show, however, that during the third year its earnings exceeded its operating expenses by \$58,127, which sum was not sufficient to pay the amount remaining due on operating expenses for the first and second years. Exclusive of

CONDITION OF
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ATLANTIC.

the 761 second-mortgage bonds which the Erie Co. acquired, as above stated, the principal of the outstanding bonds amounts to over \$8,000,000. The interest which is due on the first mortgage bonds, including the coupons taken up by the Erie Co., amounts to \$1,169,850, and all the interest which has accrued upon the second-mortgage bonds is unpaid, the interest now due on both classes of bonds being more than \$1,500,000. It is not denied that while Mr. Jewett was president of both companies, the money advanced by the Erie Co. to the Chicago & Atlantic Co. amounted to more than \$1,500,000, and the former claims, with apparent foundation, that after the execution of the second mortgage it advanced \$700,000 more.

But without reference to the fact that the Erie Co. is vitally interested in the solvency of the Chicago & Atlantic Co., and whether the latter is indebted to the former or not, the owners of bonds amounting to \$105,000, secured by the first mortgage, are entitled to their interest; and it is no answer to the motion which the trustee has made in their behalf for the appointment of a receiver that the Erie Co. has not kept faith with the Chicago & Atlantic Co. Mr. Jewett has either been unwilling or unable to establish business relations with any other trunk line, and the facts do not justify the hope that he can operate his road without some change in its relations, and pay operating expenses and interest on its bonds. In fact, the Chicago & Atlantic Co. is badly embarrassed, and probably insolvent. It may be that a change in management would improve its condition and enable it to produce an income, after paying operating expenses, sufficient to pay its debts, and interest on such of its bonds as are not held by the majority of the holders who are united with Mr. Jewett in resisting this suit and motion. But, in any event, the owners of the past due coupons are entitled to payment, and it may become necessary for the court to take possession of the mortgaged property, and operate it through a receiver, for their benefit. The physical condition of the mortgaged property is good, and taxes and labor and supply claims are not in arrears.

The appointment of a receiver rests in the sound discretion of the court; mere insolvency may or may not call for such action. A ruling on the motion for the appointment of a receiver is deferred.

Right of Trustee to foreclose Trust Deed.—See *Fire Ins. Co. v. Salisbury*, 4 Am. & Eng. R. Cas. 480; *Chicago, etc., R. Co. v. Fosdick*, 7 Id. 427; *Williams v. Morgan*, 17 Id. 217; *Dow v. Memphis, etc., R. Co.*, 17 Id. 824.

VAN WEEL

v.

WINSTON *et al.*(115 *United States Reports*, 228.)

Unless transactions set forth in a bill in equity constitute a fraud or breach of trust, for which the court can give relief, charges that the acts set forth are fraudulent are not sufficient grounds of equity jurisdiction.

A bill in equity by a holder of railway mortgage bonds against the president of the company, which alleges that the defendant received money from the sale of the mortgage bonds, but does not aver that the creditor has obtained judgment against the company upon his bonds, and that execution issued on the judgment has been returned *nulla bona*, shows nothing entitling the plaintiff to relief in equity as a creditor of the company.

The president of a railway company holds no fiduciary relation to mortgage bondholders of the company which requires him as their trustee or agent to see to the proper application of the funds received by the company from the sale of the mortgage bonds, or to account to the bondholders for any surplus from the proceeds of their bonds after constructing the works for which they were issued; his relations and duties in these respects are to the company and its stockholders, not to creditors of the company.

A, as president of a railway company, and acting in its behalf, signed and caused to be issued a circular inviting subscriptions to mortgage bonds of the company issued for the purpose of constructing "a branch from the main line to Atchison, Kansas, a distance of about fifty miles." The mortgage made to secure these bonds described the road as "the branch railroad of said party of the first part as the same now is or may be hereafter surveyed and being constructed, and leading from the Missouri River . . . at a point opposite . . . Atchison . . . by the most practicable route, not exceeding fifty miles in length, to a junction with the main line." The bonds were further secured by a second mortgage on the main line. The branch road, as located and constructed, was only twenty-nine miles in length. The first mortgage on the main line was subsequently foreclosed, whereupon B, a holder of a branch mortgage bond, commenced proceedings to foreclose that mortgage, which resulted in a foreclosure and sale of the branch to C, also one of the bondholders. B then filed his bill in equity against A personally, on behalf of himself and other holders of the branch mortgage bonds, among whom was C. The bill set forth the above facts; and the relief sought for was redress against an alleged fraud in the representation that the proposed branch would be "about fifty miles in length." On demurrer, *Held*—

That the representations in the circular were representations of the company, and were in no respect the personal representations of A.

That the complainant had no right to rely on the statement concerning the length of line as materially affecting his security.

That it was the duty of persons purchasing the bonds to look to the mortgage for the description of the property mortgaged to secure them.

That the description in the mortgage contemplated that if the best interests of the company should require a line shorter than fifty miles, the company should have the right to adopt it.

That the bill showed no right in the complainant to use the names of the

company or stockholders to obtain redress for a tort committed on them, and no equities in these respects against A.

That the bill showed no privity between A and the bondholders as to his use of money which they had loaned to the company.

THE original bill in this case was filed December 12, 1876. The amended and supplemental bill, on which judgment was rendered below, was filed May 22, 1880. Van Weel, an alien holder of bonds of the Chicago & Southwestern R. Co. of Iowa and Missouri, secured by mortgage on the Atchison Branch of that road, was complainant. The railway company, and Frederick H. Winston and Campbell, both citizens of Illinois, were defendants. Winston was former president of the company. The trustees of the mortgage of the Atchison Branch, viz., Burnes of Missouri and Dows and Frederick S. Winston of New York, were also made parties defendant, but were not served with process. Dows appeared voluntarily. The other trustees did not appear. The bill alleged that there were several intervening petitioners, joining as complainants, among whom was one Johannes Berg, also a bondholder. The bill, after setting forth the formation of the company, and a business connection with the Rock Island R. Co., made sundry allegations respecting fraudulent obtaining of the money of the complainants for the construction of the Atchison Branch, by the issue of a circular inviting subscriptions to the mortgage branch bonds. These averments are transcribed verbally in the opinion of the court, *post*, pp. 185, 187, to which reference is made.

There was attached to the bill, as an exhibit, a copy of the mortgage of the branch road. It was recited in this mortgage that the railway "company has acquired and now possesses the right, under and by virtue of the laws of the State of Missouri, to construct, maintain, and operate a branch railway from the Missouri River, opposite the city of Atchison, Kansas, by the most practicable route, not exceeding fifty miles in length, to a junction with the main line of the said first party; and whereas, the said first party has already commenced the construction of said branch line and stands in need of money to complete the same."

The property mortgaged was described in the following language: "All and singular, the branch railroad of the said party of the first part, as the same now is or may be hereafter surveyed, and being constructed and leading from the Missouri River, in the State of Missouri, at a point opposite the city of Atchison, in the State of Kansas, by the most practicable route, not exceeding fifty (50) miles in length to a junction with the main line of the railway of said first party, together with all and singular the right of way for said branch road belonging to the party of the first part," etc. There were several other provisions in the mortgage, of which only the following are material in connection with

the opinion of the court. "The said party of the first part hereby agrees to and with the said parties of the second part that the amount of bonds issued hereunder shall not exceed in the aggregate the sum of one million of dollars upon the whole of said branch line of railway from said Missouri River to said main line of the said Chicago & Southwestern R. Co., a distance not exceeding fifty miles. . . . Said Chicago & Southwestern R. Co. further covenant and agree that the money borrowed or procured for the purpose aforesaid, upon the security of said bonds, shall be faithfully applied to the building and completing of said line of railway, and to no other purpose, and that said application shall be made with due diligence."

The principal fraud (so far as considered in the opinion of the court) was charged in the following language: "Your orator further states that it was also untrue, and known to be untrue by said Frederick H. Winston, that said branch line was designed to be fifty miles in length, and therefore, with the intention to mislead and deceive the purchasers of said proposed bonds, said branch was stated in said circular to be 'about' fifty miles in length, and your orator says with before said circular was issued a contract had been entered into with one H. M. Aller for building said branch, and said Winston then knew it would not be over twenty-nine miles in length. Your orator further states that it was untrue that it was intended by said Winston that said line should pass through the counties of Buchanan, Clinton, and Platte, as stated in said circular; that said line did not, in fact, enter the county of Clinton; but your orator states that said Winston, with intention to deceive and mislead the purchasers of said proposed bonds, caused a map to be attached to said circular, whereon the junction of the branch and main line appeared to be near Cameron, and showing that said branch would, of necessity, pass through said Clinton county."

After making some other allegations referred to in the opinion of the court, the bill further charged that the complainants and other purchasers of the bonds were induced by these fraudulent representations to purchase them; that the whole sum realized from their sale was first deposited with the Rock Island Co., and then came into the hands of "Winston and his confederates" "in trust to be faithfully expended in the building and completion of said branch road;" that the parties who loaned the money for the construction of the branch road were defrauded of their promised security to the extent of twenty-one miles; that Winston, while acting as president, made a large profit in the construction of the branch, the larger part of which he converted to his own use, and the remainder divided among confederates; that the road was not properly constructed; that the branch road from the outset was substantially valueless; that Winston, as president, did

not faithfully apply the sums received from the Rock Island Company, in the building and completion of the branch road, but converted them to the use of himself and associates; that the mortgage on the main line was foreclosed at the instance of the Rock Island Company, and the mortgaged property sold and conveyed to the purchaser at the foreclosure sale; that the complainant then instituted his suit to foreclose the mortgage on the branch road, and obtain judgment of foreclosure, and the mortgaged property was sold under the foreclosure to Johannes Berg for \$10,000; that after these foreclosures the Southwestern R. Co. was divested of all its property, franchises, power, and capacity to carry on business as a railroad company, and to carry out the purposes for which it was incorporated; that the Southwestern Co. has failed to call to an accounting Winston and his associates, although requested by complainants so to do, with like allegations as to the trustees of the mortgage, who were made defendants, but not served with process; that these facts became known to complainant only shortly before the bringing of this bill; that Winston had fraudulently concealed from the complainant the fact of his interest in the construction of said road, so that the same was not discovered till shortly before the bringing of this suit; and that sufficient bonds of indemnity had been tendered to F. S. Winston, Burnes, and Dows, trustees under the mortgage, with a request that they should appear as defendants, and that Dows had appeared, but the other trustees had refused and neglected to appear. The relief asked for was the following: "That the defendants, Frederick H. Winston and George C. Campbell, may be required to render a full, strict, and exact account of their and each of their transactions in relation to the business of the Chicago & Southwestern Co., and particularly the Atchison Branch thereof, from the 1st day of June, A.D. 1871, to the present date; that the amount of moneys, bonds, stocks, subscriptions, lands, or parcels of land received or taken by said Chicago & Southwestern R. Co., or by said Frederick H. Winston and Campbell, or either of them, in connection therewith or in any way relating to said branch railway, be ascertained; that all proper disbursements or expenditures of moneys, bonds, stocks, or other property, made in the necessary construction of said branch railway, be also ascertained, and that the defendants, Frederick H. Winston and Campbell, may be charged by the decree of this court to pay the ascertained balance of receipts above proper expenditures; and if it shall appear that said Winston or Campbell, or either of them, have now in their possession or under their control any of the bonds or stocks subscribed or donated in aid of said branch railway, and which by virtue of said contract or otherwise became the property of said Southwestern Co.; or if said Winston and Campbell, or either of them, or if any other person or persons in trust for

them, or either of them, hold any lands, or parcels of land, or interests in either, derived directly or indirectly through or by means of their or either of their connection with said railway or branch, or in aid of the construction of said branch, that they be required by the decree of this court to account for and surrender the same as this honorable court shall hereafter direct. And that if it shall appear that the said Frederick H. Winston and the said Campbell, or either of them, misapplied and converted to their own use any portion of the said fund so advanced by your orator and the other purchasers of said bonds, as aforesaid, in trust to be expended in the construction of said branch road, they may be respectively charged with the amount so converted and misapplied by them, as well as all other amounts which they aided and caused to be applied for other purposes than the building and completion of said road; and that they be decreed to refund and restore the same to your orator and the other purchasers of said bonds, by whom or in whose behalf the said fund was so advanced as aforesaid; or, if some other method of relief shall appear more consistent with the character of this case, as it may be disclosed, your orators pray that said defendants, Winston and Campbell, may be required to pay into court the just and full sum due your orator upon said bonds, assuming and declaring the same to be due, together with the interest thereon, as in said bonds is provided, and that upon such payment being made, together with such further costs as may properly be imposed, your orator may surrender his said bonds for cancellation, or otherwise, as may be ordered; and that your orator may have such other and further or different relief as to equity shall seem meet."

Winston demurred to this bill on the ground of nonjoinder of indispensable parties, because other indispensable parties (F. S. Winston and Burnes) had not been served with process; that the bill was multifarious; that there was no privity between complainant and defendant; that the complainant had a complete and adequate remedy at law which he had not exhausted; that the complainant had no right to commence a suit in his own name; that the supposed cause of action did not accrue within five years next before filing the amended bill; that the amended bill set up new causes of action; that when the Southwestern R. Co. was first made party in an amended bill, the alleged causes of action were barred; and that the bill did not state a case for relief in equity. The demurrer of the defendant Campbell was to the like effect. The railway company also demurred.

The cause was heard below, on the amended bill and demurrer, before Mr. Justice Harlan, August 1, 1881. He held, as to the alleged fraudulent representations in the circular, that if a fraud was committed the remedy was adequate at law; that as to the alleged violations of duty by Winston as president, and conversion to his

own use of moneys realized from sale of the bonds, the right of action was barred by the statute of limitations; and that no trust was disclosed by the bill to exempt the complainant from the operation of the statute. The demurrers were accordingly sustained, and the bill was dismissed. Whereupon the complainant appealed to this court.

William H. Moore (*James K. Edsall* was with him on the brief) for appellant.

W. C. Goudy for appellees Frederick H. Winston and executors of Campbell.

Melville W. Fuller also filed a brief for the appellee Frederick H. Winston.

MILLER, J.—This is an appeal from a decree of the Circuit Court of the Northern District of Illinois, dismissing the bill of Van Weel, who was plaintiff below and is appellant here.

The original bill was filed December 12, 1876, and several amended bills were filed, until, on May 22, 1880, complainant filed what he calls his amended and supplemental bill, substituting it in lieu of his previous bill and amended bills.

The defendants named in this bill are the Chicago & Southwestern R. Co. of Iowa and Missouri, Frederick H. Winston, and George C. Campbell, citizens of Illinois, Calvin F. Burnes, a citizen of Missouri, and David Dows and Frederick S. Winston, citizens of New York.

Mr. Van Weel describes himself as an alien, and a subject of the King of the Netherlands, and a holder and owner of bonds of the Chicago & Southwestern R. Co. for \$67,000 principal, and overdue interest on them to the amount of \$35,175. He brings this suit, as his bill alleges, not only for himself, but on behalf of numerous other holders of the same issue of bonds, whose names he gives to the amount, including interest, of \$671,000.

The bill was demurred to, the demurrer was sustained, and a decree rendered dismissing it, from which this appeal is taken.

The contest seems to be mainly between complainant Van Weel on one side, and Frederick H. Winston on the other. Calvin Burnes, a citizen of Missouri, has not been served with process within the Northern District of Illinois, and has not appeared by himself or attorney. The same may be said of Frederick S. Winston, who is a citizen of New York.

F. H. Winston has demurred separately, and if the bill cannot be sustained against him it is obvious, from its character, that it is not good against the other defendants. The Chicago & Southwestern R. Co. also demurred.

The bill is a long one, the allegations are not classified, nor the true foundations of relief very clearly stated. It is full of the words fraudulent and corrupt, and general charges of conspiracy

and violation of trust obligations. Mere words, in and of themselves, and even as qualifying adjectives of more specific charges, are not sufficient grounds of equity jurisdiction, unless the transactions to which they refer are such as in their essential nature constitute a fraud or a breach of trust, for which a court of chancery can give relief. *Ambler v. Choteau*, 107 U. S. 586, 590.

The charges in this bill on which relief is sought may be arranged under two heads:

1. Fraudulent misrepresentations of the defendant affecting the character and value of the security on which the bonds in question were negotiated.

2. The violation of certain obligations, in the nature of a trust, which he assumed in regard to the security and ultimate payment of the bonds.

A few of the most important matters applicable to both these charges as found in the bill may be thus stated:

A company had been incorporated under the laws of Iowa to build a railroad from the town of Washington in that State, on the line of the Chicago, Rock Island & Pacific R. Co., in a south-westerly course to the Missouri River, or to the line of the State of Missouri in that direction. Another corporation had been organized under the laws of Missouri to build a railroad in that State, from a point opposite the city of Leavenworth, in Kansas, to the Iowa State line, in the direction of the city of Des Moines in that State.

These companies were consolidated into one, under the name of the Chicago & Southwestern R. Co., with the declared purpose of building a single road from Washington to the Missouri River, at a point opposite Leavenworth. Of this company Mr. Frederick H. Winston became the president and a member of the executive committee of its board of directors. The company issued bonds for \$5,000,000, which were guaranteed by the Rock Island Co., and made a mortgage on the entire line of its road to secure their payment. The length of this line was 266 miles, and the money raised on these bonds secured its rapid completion. In the mean time another corporation had been organized in Missouri to build a road from the Missouri River, opposite the city of Atchison in the State of Kansas, to some point on the line of the Chicago & Southwestern road. This road was called the Atchison Branch, and when the main branch of the Southwestern road was nearly finished, lacking, as the bill avers, only fifty miles of its completion, a consolidation was effected between the company organized to build this branch road to Atchison and the original Chicago & Southwestern Co., in which consolidation the corporation retained the name of this latter company.

This company, as consolidated, at once determined to raise a new loan of \$1,000,000, to be used mainly for the purpose of building

the Atchison Branch road, on which but little, if any, work had been done. As a security for the bonds of this loan, they made another mortgage, which was a first mortgage on the Atchison Branch, and a second mortgage on the main line. These bonds were all sold, and the two lines of road completed within a reasonable time; and it may as well be added, that both mortgages were forfeited in a few years for non-payment of interest, and the mortgages foreclosed by a sale of the roads under two different foreclosure suits.

The charge of actual fraud against Mr. Winston grows out of certain acts and representations made by him in connection with the sale of these bonds by the Chicago & Southwestern Co.

In order that no injustice may be done the complainant in regard to his allegations on this point, the language of the bill will be here given:

"Your orator further complains and states that the said Frederick H. Winston and his confederates afterwards, to wit, on or about the first day of June, A.D. 1871, contrived and entered upon a scheme to secure a loan of the further sum of \$1,000,000, for the ostensible purpose of building a branch line of road as hereinafter stated, but in reality to enable him and his confederates to get control of, and convert to their own use, a large part of the funds secured and advanced to build said branch road. And to that end, said Winston, as President of said Southwestern Co., caused a circular to be issued, a true copy of which is hereto annexed, marked Exhibit 'A,' to which reference is made as if it was incorporated herein, in which, among other things, speaking as president of said Southwestern Co., he said:

"On the first day of May, 1871, the Chicago & Southwestern R. from Washington, Iowa, to Leavenworth, Kansas, a distance of 266 miles—now finished and in operation, 216 miles—will be fully completed and opened for business under the auspices and management of the Chicago, Rock Island & Pacific R. Co. The two roads, thus under one management, will constitute a through line and the shortest through line from Chicago and the Great Lakes of the North to the extreme Southwest. Congratulating our friends and ourselves upon the prompt sale of our first issue of bonds, as well as their present established market value, both in this country and in Europe, we would present for sale, through the financial agents of the company, a second issue, for the purpose of constructing a branch railroad from the main line to Atchison, Kansas, a distance of about fifty miles."

"Said Winston, after setting forth the advantages of Atchison as a commercial and railway centre, continued as follows:

"To carry on the arrangements before stated, the Chicago & Southwestern R. Co. have issued one thousand bonds, dated June 1, 1871, each for one thousand dollars, due thirty years after date,

with semi-annual coupons annexed, at the rate of seven per cent annum, principal and interest payable in American gold coin, at the American Exchange National Bank, in the city of New York; all of which are equally secured by a first mortgage on the road to be built, its assets, rights of way, earnings, and other property, as well as by a second mortgage upon the Chicago & Southwestern R., its property and franchises.

"It was further stated in said circular that said mortgage would be 'a safe and reliable security,' the value of which would be better appreciated by the fact that the 'Chicago, Rock Island & Pacific R. Co. had already agreed to lease, and would, when completed, operate the whole line,' on terms that would pay a handsome dividend to the stockholders, and 'which in no event' would be 'less than the interest on all the bonds outstanding,' and that the value and security of the contract aforesaid was 'equal to a direct indorsement of the bonds' by the Rock Island Co.

"It was further stated in said circular:

"The Chicago & Southwestern R., for over two hundred miles west from Washington, is pointing almost directly to Atchison, so that its extension to that place involves less curvature than that of the established line to Leavenworth.' 'The Atchison Branch, through the populous counties of Buchanan, Clinton, and Platte, offers railroad facilities to wealthy agricultural communities, which in return must afford a heavy and lucrative local traffic. Every tract over which it will pass is a farm teeming with the abundant products of the famous Platte purchase.' 'With the offering of the first loan of the Chicago & Southwestern R. Co., we were admonished, as the originators of a new enterprise, to avoid the language of eulogy and enthusiasm. Difficult as was the task to those who knew its real merits, we have compensation now in a final and complete success, far beyond any expectation we dared to hope to excite by any statement in our former publication. Reviewing with a just pride all that was then written, we feel authorized to claim the confidence of the numerous friends, both in Europe and in this country, of the Chicago & Southwestern R. Co., to whom we have more than verified all our statements.' 'To complete the connections of the Chicago & Southwestern R., to extend its power and usefulness, and to increase as business and earnings, by the construction of the Atchison Branch, we now offer this loan, and commend it to our friends as a safe and desirable investment.' Dated 'New York, June, 1871,' and signed 'F. H. Winston, President.'"

The falsehood and fraud in these representations is in the alleged fact that the branch road, when built, was only twenty-nine miles and not fifty, whereby the bondholders were deprived of the security of twenty-one miles of road which they had a right to expect to make good their bonds, and that it was known to Winston

at the time that the road would not be as long as thus represented, and would not go through all the counties named. There was one of these counties in point of fact not touched by the road.

The first observation to be made on this subject is, that circulars, on which this allegation is founded, are exhibits to the bill, and, in every instance, they are clearly the circulars of the Chicago & Southwestern R. Co. They are signed by Mr. Winston as president of that company, and purport to be issued from its office, and in the charging part of the bill, copied above, and all through it, he is said "to be speaking as president of that company." There is no allegation anywhere that Winston ever gave his personal pledge or statement to any one about to invest in the bonds of the company that the road would be fifty miles long, or any other length. It is obvious, from the nature of these circulars, that the branch road had not then been located, and Mr. Winston, as an individual, could give no pledge on that subject which would bind the company, nor could he do so as president of the company. The road had yet to be located, and this could only be done by the board of directors, of whom Mr. Winston was but one of eight or ten.

AVERMENTS IN
CIRCULARS THOSE
OF COMPANY, NOT
OF WINSTON.

A source of much safer reliance as to the security which these purchasers of the bonds were getting, was the mortgage given by the company. This of course was made and recorded before the negotiation for the loan was commenced, and copies of it accompanied the bonds when offered for sale. Every prudent man, knowing that this mortgage was his main security, would examine it, or his agent would, before investing his money.

DUTY OF IN-
VESTOR TO EX-
AMINE MORT-
GAGE.

In this mortgage or deed of trust, the trustees being David Dows, Frederick S. Winston, and Calvin F. Burnes, the property conveyed is described as "the branch railroad of said party of the first part, as the same now is or may be hereafter surveyed and being constructed, and leading from the Missouri River, in the State of Missouri, at a point opposite the city of Atchison in the State of Kansas, by the most practicable route, not exceeding fifty miles in length, to a junction with the main line of the railroad of said party of the first part."

Whatever representation may have been made in the circulars of the company was, according to all rules of evidence, superseded by this solemn instrument between the parties. If they differed in any respect, the latter must be looked to as the security on which the bondholders alone had a right to rely. This instrument, so far from giving any pledge or assurance that the branch road should be fifty miles long, or near that, is careful to say it shall not exceed that length. The limitation is in its length, not its shortness. The latter is provided for by saying that it should be by the most practicable route.

WHEN CIRCULAR
AND MORTGAGE
DIFFER THE LAT-
TER SHOULD BE
RELIED ON.

It is impossible to read this description of the line of road, conveyed as security for the bonds, without seeing clearly that the line was not yet located—that its future location was to be governed by two considerations: (1) that it should be the most practicable route between Atchison and the main line of the road, and (2) that its length should not exceed fifty miles. If the most practicable line, by which it evidently meant the best working line for the company who was building it, should require a shorter line than fifty miles, there is not the shadow of a promise or suggestion that it should not be so long, and no longer, as that required. But in the provision that its length should not exceed fifty miles, there was a protection against wasting the money received from the bondholders on a long and unprofitable line of road made only for the benefit of people living along that line.

But this line of road was not the only security for the payment of these bonds. The mortgage included also the entire main line from Washington to Leavenworth, 266 miles, which was now nearly completed. This made a direct connection between the rich agricultural country of western Missouri and the city of Chicago by means of the Chicago, Rock Island & Pacific Co., then a rich and prosperous corporation, so deeply interested in this Southwestern R. that it had guaranteed \$5,000,000 of the bonds of the company. It was further stipulated in this mortgage or deed of trust that the proceeds of the sale of these bonds should be placed in the hands of the Rock Island Co., which should only pay them out in the regular prosecution of the work. It was further provided in that mortgage that if any of these proceeds remained with that company after the completion of the road, it should be paid over to the president or other authorized agent of the Chicago & Southwestern Co.

PLACE OF CONNECTION BETWEEN BRANCH AND MAIN LINE IMMATERIAL.

It cannot be doubted that this mortgage on the main line, though a second lien, was regarded as an important part of the security of the bondholders under it, and when taken in connection with the aid and interest of the Rock Island Co., the precise length of the branch line could not have been held to be very important. In fact, as the two lines belonged to one company, and that company was liable for all the bonds, it was obviously the interest of the bondholders and of the stockholders that the branch line should be located so as to make it add to the profits of the entire enterprise on which the bondholders held a lien.

In regard to the allegation of fraud in this matter it is apparent—

1. That all that is charged against Mr. Winston is that he signed or permitted his name to be affixed to a circular which stated the probable length of the branch road, then unsurveyed and unlocated, as about fifty miles.

2. That the place of junction with the Southwestern road,

which necessarily determined the length of the branch road, was not described or mentioned.

3. That in the mortgage which was made on said branch road, all that was said was that it should not exceed fifty miles.

4. That it is nowhere averred that the line was not properly located, or that it should have been located otherwise.

5. That the security which the bondholders had upon that line and the other seemed to render the place of connection between the branch and the main line unimportant, as regards the security for their loan.

We are of opinion, therefore, that the complainants had no right to rely on the statement concerning the length of the line as materially affecting their security, and that Mr. Winston committed no fraud in the part he took in that matter. This view is reinforced by the admission of the bill, that the branch road was completed mainly out of the money arising from the bonds sold to plaintiff and others, and that several years after both it and the main line had been finished and in operation both roads were sold under the two mortgages; that the branch line was sold under foreclosure proceedings inaugurated by Van Weel, and was bought in for \$10,000 by Mr. Berg, one of Van Weel's associates as bondholder, and that they now, as far as appears, own the road their money was used to build.

Other transactions are mentioned as fraudulent, such as that Mr.

DIVISION OF PROCEEDS OF BONDS;
NO INJURY TO
BONDHOLDERS.

Winston converted some of the money arising from these bonds to his private use, and not to the purposes of the company. The answer to this is, that Mr. Winston came under no obligation to see to the application of this money as the bondholders might think it ought to be applied. They had bought their bonds, paid their money, and received their security. The money so diverted was the money of the Southwestern Co., and not their money.

The wrong done by Winston in that matter, if wrong there was, was done to that company, and not to the bondholders. They had provided their own means of insuring the building of this branch road, by disbursing the money through the Rock Island Co., and it was successful. The road was built. There was no privity between Mr. Winston and these bondholders as to his use of money which they had loaned to the company, which was no longer their money. The error which pervades the bill throughout is to treat this corporation, to which the bondholders loaned their money, as if it had no existence, as if they had loaned it to Mr. Winston and held his personal obligation that it should all be honestly applied, and be responsible for the repayment of the loan. If Mr. Winston cheated this company out of its money, the right to redress for that wrong is in the company or in its stockholders. As a creditor of the company, Mr. Van Weel has no right to in-

terfere in the matter until he has a judgment against the company, with an execution returned *nulla bona*. He has not in this suit shown any right to use the name of the company or of its stockholders to obtain redress for a tort committed on them. *United States v. Union Pacific R. Co.*, 98 U. S. 569, 614.

There are probably other allegations of fraud, but they are no better founded than these, and we can give them no further attention.

As regards the matter of trust, which is one of the grounds of relief set up in the bill, we need not occupy much time in its consideration.

The trustees in the mortgage, which is the only express trust that we can find set out in the bill, were Frederick S. Winston, David Dows, and Calvin Burnes, neither of whom resides within the jurisdiction of the court, or has been served with process.

If, however, they were before the court, they are not charged with any breach of the duty with which they were entrusted.

The application of the money arising from the mortgage bonds was not by the mortgagees entrusted to them, nor had they any control over it after the bonds were sold.

It is not alleged that they refused to foreclose the mortgage when it became forfeited by non-payment of interest, or that they failed to perform any duty imposed upon them by the mortgage.

It is asserted, however, that Frederick H. Winston, as president of the company, was bound to see that the money raised on these bonds was used exclusively in the construction of the branch road, and that, in this regard, he was a trustee for the lenders of the money. We are unable to see any such trust in the matter.

The contracting parties in regard to this loan were the bondholders and the Southwestern Co. The one became debtor for the money loaned, the other became creditor. Mr. Winston, as the president of the company, represented the company, the borrower. The lenders desired a security for the repayment of their money, which they obtained in the mortgage, and their

trustees in that trust were Dows, Burnes, and F. S. Winston. They, in that instrument, undertook to secure the building of this road out of the money loaned, by requiring its deposit with the Rock Island Co., and its disbursement, for that purpose, under its supervision. But if the loan should produce more than was necessary for that purpose, what was to become of it? Was it to go back to the lenders? There is no hint of the kind. It was impracticable to do so, because the bonds would, many of them, have changed hands. As to the new owner, it would have been a mere gratuity to return it, and the original lender had no interest in the matter. Instead of this it is expressly declared that the Rock Island Co. could relieve

WINSTON DID
NOT HOLD PRO-
CEEDS OF BONDS
AS TRUSTEE FOR
BONDHOLDERS.

itself of further obligation in the matter by payment to the president of the company.

When thus paid did he hold it as trustee for the bondholders? If so, under what trust or what obligation? Could he return it to the bondholders with the bonds still outstanding against the company? Or did he hold it merely as the representative of the company of which he was president. We think it was clearly the money of the company, and could have been used by it for the purchase of rolling-stock, general equipment, or any other legitimate use of its own money.

This money belonged to the company. The road was built—the only interest in the nature of a trust which the lenders had attempted to protect by the control of the funds. The obligation of Mr. Winston in the disposition of the money, if any of it came into his hands, was to the company. If it was lost it was the company's loss, not appellant's. If he improperly or fraudulently converted it to his own use, he was liable to the company and not to the plaintiff in this suit. There was no privity or trust relation between him and them in this regard.

We think appellant has shown no right to relief in this suit; that the demurrer was properly sustained; and the decree of the circuit court dismissing the bill is therefore affirmed.

BROWN, TRUSTEE, etc., v. STATE OF MARYLAND, AND ANNAPOLIS AND ELKBRIDGE R. Co.

STATE OF MARYLAND v. BROWN, TRUSTEE, etc., AND ANNAPOLIS AND ELKBRIDGE R. Co.

(*Advance Case, Maryland. July 22, 1885.*)

The principle of *res adjudicata* extends, not only to the questions of fact and of law which were decided in the former suit, but also to the grounds of recovery or defence which might have been, and were not, presented.

Where by the articles of a deed of trust of the property and franchises of a railway company it is provided that in case default is made in the payment of the principal or interest of the bonds it shall be lawful for the trustees to sell and dispose of the property and franchises of the company, and it is made their duty to exercise such power of sale upon the requirement of a majority in interest of the bondholders, it is not a valid ground for delaying the sale that it had not been ascertained how many of the bonds were justly due. Each bondholder holds his bonds separately and independently of all others; and when his interest remains in arrears, under the circumstances mentioned in the deed of trust, he ought not to be delayed by a controversy arising in regard to the validity of bonds held by other persons. Upon the sale of a railroad under such circumstances, when the proceeds are brought into court for distribution, it is then competent for any party in interest to except to the claim of any bondholder; and if the proceeds are not sufficient

to pay all the bondholders, they may except to the claims of each other. Such bonds are negotiable instruments, and are good in the hands of *bona-fide* holders for value, without notice of any equities or defence against the first holders.

THIS was a bill filed, alleging that a certain deed of trust between the Annapolis & Elkridge R. Co. and Brown and others, trustees, was null and void, and asking that the trustees be restrained from making sale of any of the property of the railroad company. Substantially the same questions were raised and decided between the parties in a case reported in 62 Md. 439.

Stewart Brown and *S. Teackle Wallis* for trustees.

Charles B. Roberts, attorney-general, for State.

John Ireland and *Charles Marshall* for railroad.

BRYAN, J.—We have heretofore decided a cause between the parties to this record. The State of Maryland filed a bill in equity, in which it was maintained that it had a lien on all the property and franchises of the Annapolis & Elkridge R. Co., and that said lien was prior to that created by the deed of trust in question, even if the deed were valid; and it was further maintained by the State that the deed of trust was wholly invalid, or else was FACTS. valid only to the extent of creating a lien for such of the bonds secured by it as were used for the particular purposes expressed in the first section of the act of 1872, chap. 425. The prayer of the bill was for an injunction to restrain the trustees from making sale of all or any part of the property of the railroad, and alternately to restrain them from making sale until they had ascertained by proper proceedings the parts or proportions of these bonds which had in fact been used for the purposes expressed in the first section of the act of 1872. There were other prayers for relief adapted to the different aspects of the case. The defendants in the cause were the Annapolis & Elkridge R. Co., and the trustees, Stewart Brown and Arthur George Brown. The answer of the trustees controverted the case made by the bill, and maintained the validity of the deed of trust and its priority to the rights and claims of the State. It also alleged that more than \$150,000 of these bonds, which had been duly issued under and in accordance with the terms of the deed of trust, had been negotiated through Alexander Brown & Sons, and were outstanding in the hands of *bona-fide* purchasers for value; and that others of these bonds were outstanding in the hands of persons and corporations who claimed to be *bona-fide* holders for value. The cause was heard on bill and answer, and this court decided, upon the facts which were shown by the proceedings in the cause, that the deed of trust was valid; and that bonds to an amount exceeding \$150,000 had been duly negotiated, and were outstanding in the hands of *bona-fide* purchasers for value; and that other bonds

were in the hands of different persons, who alleged that they also were *bona-fide* holders for value; and that the State was not entitled to any of the relief prayed. The bill was therefore dismissed. This case is reported in 62 Md. 439.

In the present case, the bill is filed by the same complainant, and the same parties are defendants. It alleges that the deed of trust is null and void; as a consequence, it is maintained that all the bonds issued under its provisions were invalid, and that the trustees have no power of sale. Certain of the bonds amounting to \$252,000 are specifically charged to have been issued and used in pursuance of a fraudulent agreement, and it is alleged that they are held by persons who had notice of the fraudulent character of the bonds at the time they received them. The relief prayed is, that the deed of trust may be declared null and void, and that the trustees may be restrained by injunction from making sale of any of the property of the railroad.

It is manifest that the relief sought in each of these cases is the same. The present bill repeats the allegations of the former one, and supports and fortifies them by other charges. The scope and object of both bills is the same; all of their averments tend to the same conclusion. The purpose in each case was to strike down and defeat the power of sale contained in the deed of trust. It was entirely competent for the complainant to make in the first bill of complaint every allegation which was made in the second. It is not alleged that any of them were unknown at the time the first bill was filed; and, in point of fact, all of these additional allegations were contained in the petition for an injunction filed by the Annapolis & Elkridge R. in June, 1878, which petition was signed by the attorney-general of the State, who appeared in the cause by order of the general assembly of the State and the board of public works. According to well-settled principles, our decision in the first case finally determined, as between the parties to the suit, all matters then adjudicated. As between these parties, no matter then decided can ever again become the subject of controversy. "Where every object urged in the second suit was open to the party within the legitimate scope of the pleadings in the first suit, and might have been presented in that trial, the matter must be considered as having passed *in rem judicatem*, and the former judgment in such a case was conclusive against the parties." *Aurora City v. West*, 7 Wall. 102. In a subsequent case in the same volume, the Supreme Court of the United States, speaking of the principle of *res judicata*, say: "It extends not only to the questions of fact and of law, which were decided in the former suit, but also to the grounds of recovery or defence which might have been, but were not, presented." *Beloit v. Morgan*, 7 Wall. 622. And in the same case the court quotes with approbation

RES ADJUDICATA—GROUNDS OF RECOVERY WHICH MIGHT HAVE BEEN STATED IN FORMER SUIT.

the striking language of the vice-chancellor, in *Henderson v. Henderson*, 3 Hare, 115, as follows: "In trying this question, I believe I state the rule of the court correctly, that where a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as a part of the subject in contest, but was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted a part of their case. The plea of *res judicata* applies, except in special cases, not only to the points upon which the court was required by the parties to form an opinion and pronounce a judgment, but to every point which properly belonged to the subject of litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time."

It appears to us, therefore, inevitable that our decision in the former case must be conclusive between these parties, of every matter which then passed into judgment. We then determined that the deed of trust was valid; that bonds exceeding the amount of \$150,000 were in the hands of *bona-fide* holders for value; that default had been made in the payment of the interest, and that the trustees had the power of sale, in accordance with the terms of the deed of trust, and we accordingly denied the injunction. We trust that hereafter our opinion may not be misunderstood.

Our decision binds the parties to this suit and those represented by them, and no other persons. We will, in the course of this opinion, make further explanation on this point. But we may now say that as this suit sought the general benefit of all the stockholders, they are effectually bound by the result of it and they cannot hereafter be heard to deny the right of the trustees to sell, in accordance with the terms of the deed of trust.

Our duty would not be fully discharged without considering some other questions discussed in this case. By the fourth article of the deed of trust, it is provided that in case default is made in the payment of the principal of any of these bonds, or in the payment of the interest under the circumstances therein referred to, it shall be lawful for the trustees to sell and dispose of all the property and franchises of the railroad company. And in the eighth article it is made their duty to exercise the power of sale, upon the requirement in writing of a majority in interest of the bondholders. As the parties have, by their own agreement, provided for the contingency under which a sale may be made, the courts must give effect to the power of sale thus given. In this respect the proceedings differ from those in the case of a sale under a mortgage. Where a bill is

POWER OF SALE
ON TRUST DEED.
ASCERTAINMENT
OF AMOUNT DUE.

filed to foreclose a mortgage, the State authorizes the court to decree a sale unless the debt and costs are paid at or before the time fixed by the decree; and it is necessary for the court to ascertain the amount of the debt, so that the defendant may know how much it is necessary for him to pay in order to prevent the sale. It would be contrary to the agreement of the parties, as embodied in the deed of trust, to hold that the sale should be delayed until it was ascertained how many of the bonds were justly due. Each bondholder holds his own separately and independently of all others; and when his interest remains in arrear under the circumstances mentioned in the deed of trust, he ought not to be delayed by a controversy which should arise about the validity of the bonds held by other persons.

We are of opinion that the Drum Point R. Co. had power to purchase stock in the Annapolis & Elkridge R. Co. Booth v. Robinson, 55 Md. 434. It is now too late to question the regularity of the election of the directors who ordered that the deed of trust should be executed. The deed was executed in June, 1872, and all parties interested had abundant means of knowing every detail connected with the transaction. No reason has been shown why so great a delay should have occurred in asserting any objections which they desired to urge against the deed. And in the mean time very valuable interests have vested on the faith of the deed. We must say, moreover, that the evidence in the cause shows that the election of the directors was not contrary to the charter of the company. The entries in the book of the proceedings of the company are not evidence against third persons. The efficient proof in the case is derived from the testimony of a witness who had personal knowledge of the transaction.

The sale of the shares of stock by Brown and Wells to the Drum Point R. Co. was evidently for the purpose of giving to it the control of the Annapolis & Elkridge Co. It is unnecessary to comment upon this proceeding. The Drum Point Co. had the right to acquire this stock, but it had no right to use its controlling influence in the board of directors so as to sacrifice the interest of the Annapolis & Elkridge R. Co. We think that the title which Wells and Brown acquired to the bonds issued to them could not have been maintained against the stockholders of the Annapolis & Elkridge R. Co.; nor could the title of the Drum Point Co. have been maintained to the bonds which it acquired under the agreement in the record. We do not impeach the motives of the directors who authorized this disposition of the bonds. They were gentlemen of high character and responsibility; but we think that they fell into a very great error in this matter. Although the original title to these bonds was defective, yet such of them must be protected as are now in the hands of *bona-fide* holders for value,

PURCHASE BY A
COMPANY OF
STOCK IN AN
OTHER COMPANY.
DEPRESSING
VALUE OF STOCK.

without notice of the objections to their validity. The evidence which we have been considering was given on the motion to dissolve the injunction, and any conclusion formed upon it by the court could be used only at the hearing of that motion; nevertheless, for the purpose of diminishing as much as possible unnecessary litigation, we have thought it best to state our views on important questions which must arise hereafter in this controversy.

If the property of this railroad should be sold, when the proceeds are brought into court for distribution, it will be competent for any party in interest to except to the claim of any bondholder. If the proceeds are not sufficient to pay all the bondholders, they may except to the claims of each other. The matters DISTRIBUTION OF PROCEEDS OF SALE. RES ADJUDICATA. adjudicated in this case and the former one, between the same parties, will not be available for or against the bondholders, except as establishing the right of the trustees to make the sale. The trustees represent the bondholders for this purpose; but not in the matter of distribution. After the sale the bondholders must stand on their own footing, and must maintain their own claims by evidence. Our finding that more than \$150,000 of the bonds were in the hands of *bona-fide* holders for value established that fact conclusively in favor of the trustees, so as to enable them to make the sale, but will not be evidence for the bondholder when he claims distribution. On that issue it will be *res inter alias acta*. It is fully settled that bonds of this description are negotiable instruments, and are good in the hands of *bona-fide* holders for value, without notice of any equities or defences against the first holders. The supreme court of the United States speaking of such bonds has said: "They are placed by numerous decisions of this court on the footing of negotiable paper. They are transferable by delivery, and, when issued by competent authority, pass into the hands of a *bona-fide* purchaser for value before maturity, freed from any infirmity in their origin. Whatever fraud the officers authorized to issue them may have committed in disposing of them, or however entire may have been the failure of the consideration promised by parties receiving them, these circumstances will not affect the title of subsequent *bona-fide* purchasers for value before maturity, or the liability of the municipalities (the makers of the bonds). As with other negotiable paper, mere suspicion that there may be a defect of title in its holder, or knowledge of circumstances which would excite suspicion as to his title in the mind of a prudent man, is not sufficient to impair the title of the purchaser. That result will only follow where there has been bad faith on his part." *Cromwell v. County of Sac*, 96 U. S. 51. In the same case, they say: "The simple fact that an instalment of interest is overdue and unpaid, disconnected from other facts, is not sufficient to affect the position of one taking the bonds and subsequent coupons before their maturity for value as

a *bona-fide* purchaser." *Vide*, also, *Railway Co. v. Sprague*, 103 U. S. 756; s. c., 2 Am. & Eng. R. R. Cas. 532. We accept these decisions as conclusive of the questions involved in them.

It seems necessary to consider only one other question. We think that the amendment of the pleadings is within the discretion of the court, and that no appeal lies from their decision. The appeal of the State must be dismissed. As the defence of *res adjudicata* must settle this controversy at the final hearing, further litigation is needless. We will, therefore, reverse the order of the circuit court, and dismiss the bill.

Order reversed and bill dismissed.

Chief Judge ALVEY filed a separate opinion, in which Judges ROBINSON and RITCHIE concurred; Judge STONE also filed an opinion.

Issue of Bonds in Violation of Restrictions of Charter—Rights of the Bona-fide Purchases.—A railway company had a charter providing that bonds bearing interest at the rate of 7 per cent per annum could be hypothecated or sold by the company within or without the State where issued "to raise or borrow money at a price not less than 80 cents on a dollar, and all other bonds to be issued shall be sold or exchanged at par, and in no case shall bonds, whether hypothecated or sold, become a debt or liability of the corporation at less than 80 cents on the dollar." Ellsworth became the *bona-fide* holder of 80 bonds of the company and died. His executor brought suit against the company on those bonds. *Held*, that plaintiff's testator being a *bona-fide* holder of the bonds, it could not be shown against an action upon them by his executor that restrictions imposed by the railroad company's charter upon its power to negotiate its bonds were violated, the violation of restriction relied upon being the sale of the bonds at 90 cents per dollar, instead of at par as required by the charter.

Held, also, that the charter having been granted by the States of Illinois and Indiana, its provisions would render illegal only contracts made in violation of it in those States, and that the sale of the bonds in question having been made in New York, the contract of sale was governed by the laws of New York, under which it was legal. *Ellsworth v. St. Louis, A. & T. H. R. Co.*, 98 N. Y. 558.

"Two County" Mortgages prohibited—Railway mortgage held void.—Sec. 20, art. 4, Constitution of Oregon, declares that "every act shall embrace but one subject, and matters properly connected therewith, which subject shall be expressed in the title." An act of the Oregon legislature called the "mortgage tax law" provided, amongst other things, that "all mortgages, deeds of trust, contracts, or other obligations hereafter executed, whereby land situated in more than one county in this State is made security for the payment of a debt, shall be void."

Held, (1) That this provision, declaring two-county mortgages void, is sufficiently relative and germane to an act providing for the taxation of money secured by a mortgage on land, and that the title of the act sufficiently expressed its nature. (2) That railway mortgages were within the purview of the act, and that if they included land situate in more than one county they were void. (3) That when a debt payable at a future date, with interest payable in the mean time at stated intervals, is secured by mortgage and default is made in payment of an instalment of such interest, a suit in equity may be maintained to enforce the lien of such mortgage so far as such instalment is concerned by a sale of so much of the mortgaged pro-

perty as may be necessary to pay the same; but if such property cannot be sold in parcels without injury to the parties or one of them, then the court may order the whole of it sold free from the lien of the mortgage, and apply the proceeds on the whole debt according to its then value. *Farmers' L. & T. Co. v. Oregon & C. R. Co.*, 24 Fed. Repr. 407.

Reorganization—Transfer of Railroad to New Company—Priorities as between Creditors of Old and Bondholders of New Company.—Respondent had a claim against the St. Louis & Keokuk R. Co. This company being insolvent, its stockholders and officers organized the St. Louis, Hannibal & Keokuk R. Co., to which they transferred the assets of the St. Louis & Keokuk R. Co., in consideration of stock in the new company. The new company proceeded with the contemplated and unfinished work, taking possession of all the road-bed, etc., of the prior corporation, with notice of respondent's demand not then reduced to judgment. It subsequently issued a mortgage to secure its bonds, and the plaintiff filed his bill to foreclose the same with an intervening receiver duly appointed. This bill made respondent a defendant, and he answered, setting up his demand which had been reduced to judgment, and by a cross-bill he prayed for a decree establishing his demand as a lien prior in right to the lien of the mortgage as against so much of the property of the old corporation as is included in the mortgage by the new corporation.

Held, That a transfer of the assets of one corporation to another whereby through a mere change of name an attempt is made to defraud creditors, or which would obtain as a fraud, cannot be upheld against such creditors, and that a transfer disabling it from performing its corporate duties is practically such a fraud, making transferee with notice a trustee taking *cum onere*.

Held, also, that if in such a case the transferee mortgages its property to secure the payment of bonds, the lien of creditors of the old corporation upon the property transferred will be prior in right to that of bondholders with notice. *Blair v. St. Louis, H. & K. R. Co.*, 22 Fed. Repr. 86.

Reorganization—New Company cannot sell out without Consent of Dissenting Shareholders—Rights of Bondholders with Notice.—The Knoxville & Kentucky R. Co. was organized in 1855 to build a road from Knoxville to the Kentucky line in the direction of Louisville and Cincinnati. The city of Knoxville subscribed \$100,000 to its capital stock. Thirty-eight miles of the road was built when the company became insolvent, and the State foreclosed a statutory lien on the road, which was sold to W. B. Johnson and associates for \$350,000. Johnson and his associates reorganized themselves into the Knoxville & Ohio R. Co., which became vested with all the powers, rights, privileges, and immunities of the old Knoxville & K. Co. The new company issued a mortgage of \$500,000 upon the road, fixed its capital stock at \$1,100,000, of which Johnson and his associates retained two thirds, and gratuitously distributed the balance among the stockholders of the old company, giving \$100,000 thereof to the city of Knoxville. The organization of the Knoxville & O. R. Co. was completed in 1871. It operated the road until July 1, 1881, becoming indebted, during the ten years to the East Tennessee, Va. & Ga. R. Co. for between \$1,200,000 and \$1,500,000, advanced by the latter company to enable the former to extend its road to the Kentucky line. This advance the K. & O. R. Co. was unable to repay, and on July 8, 1881, pursuant to a resolution adopted by a large majority of its stockholders in a meeting duly called for that purpose, the K. & O. R. Co. made and delivered its deed conveying its road, franchises, and all other property to the E. Tenn., Va. & Ga. R. Co., which, in consideration thereof, agreed to pay all the liabilities of the K. & O. Co., including the advances aforesaid, and to issue to its stockholders of the common stock of the E. Tenn., Va. & Ga. R. Co. an amount at its face value equal to the stock respectively owned by them in the K. & O. Co. In these proceedings the city of Knoxville was not

represented. Nor did the city either ratify or dissent from the sale until it commenced suit subsequently to set it aside.

After the E. Tenn., Va. & Ga. R. Co. obtained possession of the K. & O. property under the aforesaid conveyance, it executed to the Central Trust Co. of New York two mortgages covering the K. & O. property and intended to secure the payment of a large number of first-mortgage and income bonds which it had issued and sold for value to *bona-fide* purchasers.

On June 28, 1888, the mayor and aldermen of Knoxville filed a bill in behalf of the city and all other stockholders of the K. & O. R. Co. against the K. & O. R. Co., the E. T., Va. & Ga. R. Co., and the Central Trust Co. of New York, praying for a decree annulling the conveyance made by the K. & O. Co. to the E. T., Va. & Ga. R. Co., and declaring the mortgages made by the last-named company to the Central Trust Co. of New York, hereinbefore mentioned, a cloud upon the title of the K. & O. R. Co.'s property embraced therein and removing the same. It was alleged in the bill that the city of Knoxville owned \$100,000 of stock in the K. & O. R. Co., and that the conveyance sought to be annulled was made without its consent and in fraud of its rights.

The city of Knoxville did not aver in its bill that it had requested the K. & O. R. Co.'s officers to bring suit to set aside these conveyances, and that the company had refused to do so.

Held, that under the 94th rule of the U. S. Supreme Court such request and refusal must be averred in order to enable the city to maintain its bill.

The questions raised by the city's bill were, however, presented upon other pleadings filed in the case. Hence, it was also *held*, (1) that the charter of the K. & O. R. Co. did not authorize it to make the conveyance of its property to the E. T., Va. & Ga. R. Co., but that legislative permission to such purchase and sale had been given by the acts of the legislature of Tennessee of November 9 and December 11, 1871; but (2) that this legislative permission amounted to nothing more than a waiver of any right the public or the State might have to object to the sale and conveyance made, and did not divest or impair the rights of shareholders as between themselves and as guaranteed by the company's charter; and that under the charter the majority of the stockholders could not, as against the wishes of a minority, make a sale and conveyance of the company's property and franchises. (3) That no laches were imputable to the city as a holder of stock that would preclude it from asserting its rights as a stockholder dissenting to the sale and conveyance; and (4) that the Central Trust Co. took its mortgages with notice of the want of power of the company to make them, and that the Trust Co. and bondholders, therefore, did not occupy the position of innocent holders, and that a decree should be entered rescinding the sale and removing the mortgages as clouds upon complainant's title. Mayor, etc., of the city of Knoxville v. Knoxville & Ohio R. Co., 22 Fed. Repr. 758.

Priorities as between Contractors holding Lien on Road and Purchasers of Certificates of Bonds.—The Selma, Marion & Memphis R. Co. was organized and chartered. It constructed and equipped portions of its railway, then failed, and was sold under mortgage foreclosure for \$10,000 to Busby and others, who reorganized themselves into a corporation known as the Memphis, Holly Springs & Selma R. Co., which relinquished all rights to the portion of the road in Alabama and took for itself that part lying in Tennessee from Memphis to the Alabama line. The new corporation fixed its capital stock at \$1,000,000, estimated the value of the property, etc., purchased at the sum of \$268,000, to be divided into shares of \$100 each, to be distributed among the purchasers according to the interest of each, and to be held and treated as so much paid-up capital stock not subject to call, certificates of which were executed and delivered to the respective shareholders.

June 1, 1881, a resolution was passed by the stockholders of the company authorizing the president and directors, for the purpose of raising money for the construction and equipment of the railway and for no other purpose, to issue bonds with interest coupons attached, and a mortgage upon the property and franchises of the company to secure their payment. Nothing was done under this authority other than a resolution of the directors authorizing the president and finance committee to execute the bonds and mortgage, until August 2, 1881, when, by another resolution of the stockholders in convention assembled, the former resolution was amended so as to authorize the amount of bonds and coupons to be issued for the purpose stated in the former resolution and no other, to be \$8,500,000 and to be payable January 1, 1921. At the last stockholders' meeting the name of the corporation was changed to that of the Memphis, Selma & Brunswick R. Co.

Prior to January 6, 1881, the stockholders placed their certificates of stock in the hands of Busby, to be sold by him to W. M. Forrest, one of their number, at twenty-five cents on the dollar, which was paid by Forrest to Busby and by him paid to the stockholders, and the certificates of stock were then delivered to Forrest as the holder.

On January 6, 1881, a contract was entered into between Forrest, as a stockholder, and Fred. Wolfe, president of the company, in writing and signed by both parties, by which Forrest agreed to sell, and Wolfe to purchase for himself and those associated with him, the entire capital stock in said corporation, and for which Wolfe agreed, as soon as the bonds could be lawfully issued, to procure first-mortgage bonds to the amount of \$263,000, to be secured by a mortgage covering all the property and franchises of the company. Under this agreement, Forrest delivered the certificates of stock to Wolfe and received from Wolfe a certificate for each bond to be delivered in the following form:

"MEMPHIS, SELMA & BRUNSWICK R. CO.—FIRST MORTGAGE BONDS.

"Total issue, \$3,500,000. \$1000 each.

"This is to certify that William M. Forrest is entitled to one bond of one thousand dollars, with coupons thereto attached, No. _____ of first-mortgage bonds of the Memphis, Selma & Brunswick R. Co., dated July 1, 1882, and bearing interest at the rate of six per cent per annum, payable semi-annually, which will be delivered to him, or order, upon the surrender of this certificate, as soon as said mortgage is executed and said bonds engraved.

"Witness the seal of the company, and the signature of the president and secretary, at Memphis, Tennessee, this first day of July, 1882.

"FRED. WOLFE, President.

"M. CALM, Secretary."

These certificates were sold by Forrest at 20 cents per dollar and upwards, to Thompson and others, complainants.

January 8, 1883, a mortgage of the property and franchises of the company to secure payment of bonds thereafter to be executed was made by the company and recorded.

Prior to this time, on July 23, 1882, the company contracted with Green, Hamilton & Co. for the construction of the road from Memphis to Holly Springs at stipulated prices, to be paid in first-mortgage bonds of the company at ninety cents per dollar; and Wolfe, the president of the company, individually agreed with Green, Hamilton & Co. to cash the bonds or certificates for their delivery at ninety cents per dollar, and did so, for all work done and materials furnished up to November 1, 1882, amounting in bonds to \$75,000. At that time Wolfe became unable further to cash the bonds which might be issued to Green, Hamilton & Co. for construction. Thereupon Green, Hamilton & Co. refused to receive bonds or certificates

for bonds, but they continued work during November and December, 1883, Wolfe paying them therefor in cash \$30,089.89, and giving them the acceptance of the company endorsed by him individually for the balance of their estimates for these months. These acceptances were not paid.

January 1, 1883, a new construction contract was made whereby Green, Hamilton & Co. agreed to do the work and the company agreed to pay therefor in cash. Work under this last contract progressed until in March or April following; but was not paid for and the contractors finally stopped work on account of the failure of the company to meet its obligations. The Indianapolis Rolling Mill Co. had also, prior to the stoppage of the work, furnished iron rails for which the company had not paid, and there were engineers and other employees in the construction of the road for whose services no payments had been made. Green, Hamilton & Co., the Indianapolis Rolling Mill Co., and Wolfe, on behalf of the unpaid employees, thereupon proceeded to enforce their statutory liens for work and labor done and materials furnished, securing judgments as follows: Green, Hamilton & Co., \$191,125.61 and costs; Indianapolis Rolling Mill Co., \$69,153.65 and costs; and Wolfe, as trustee of unpaid employees, \$13,508.52 and costs,—each judgment being declared a co-ordinate lien with the others upon the property and franchises of the company. Under these circumstances the complainants Thompson and others, holders of the certificates issued as above to Forrest, and by him sold to them, filed a bill to determine the rights and priorities of themselves and the contractors, material, men, and employees whose judgments were noted above.

Held, (1) That the judgment in favor of the Indianapolis Rolling Mill Co. and that in favor of Wolfe in behalf of the unpaid employees were in equity prior liens to complainant's claim.

(2) That the certificates above mentioned were issued by Wolfe as his individual obligations, neither the charter of the company nor the resolutions of the stockholders or directors authorizing their issuance on behalf of the company.

(3) That, inasmuch as Wolfe had in his possession seventy-five bonds for \$1000 each that were issued in payment for work done and materials furnished by Green, Hamilton & Co., and by them sold to Wolfe, Wolfe must be decreed to comply with his contract with Forrest above expressed, and as the bonds are in court, their beneficial interest should be decreed to be in complainants.

(4) That Wolfe's contract with Green, Hamilton & Co. to cash the bonds which might be issued to them was a personal obligation on his part, and that for its breach he alone was responsible.

(5) That Green, Hamilton & Co.'s judgment gave them a lien upon the fund in court for all the materials furnished and work done on the railway after the change of the contract made January 1, 1883, which lien was not displaced by the execution of the mortgage, as neither Forrest, nor the holders of the certificates issued to him were purchasers or encumbrancers without notice.

(6) That no new bonds would be declared by the court to be issued to the holders of the certificates, it not being in the power of the court to create an equitable mortgage to secure their payment. *Thompson v. Memphis S. & B. R. Co.*, 24 Fed. Repr. 338.

Suit for benefit of Unsecured Creditors of Bankrupt Railway Company—Lien of Attorneys for Fees.—A railway company became insolvent and transferred its property and franchises to a new company, leaving unpaid a large amount of unsecured indebtedness. Branch and certain other unsecured creditors retained attorneys to file a bill to reach the assets of the old company, and to apply them to the payment of the claims of Branch and his associates, and also for the benefit of any other unsecured creditors who

might come in to share in the results of the litigation. The litigation proved successful, and the attorneys made a claim for compensation based upon the total amount of unsecured indebtedness, which was resisted by their immediate clients, Branch and others, on the ground that the attorneys could claim only a fee for the recovery of the moneys due their immediate clients. Thereupon the attorneys filed their petition in the cause to be allowed reasonable compensation not only in respect to the demands of their clients, but also in respect of the demands of other unsecured creditors who filed their claims under the decree, and to have a lien declared therefor on the property reclaimed for the benefit of such creditors.

Held, that the attorneys were entitled to a reasonable compensation for their professional services in establishing a lien, and that such compensation should be made with reference to the amount of all claims filed in the cause, although the evidence thereof may have been retained in the custody of the respective creditors; excepting, however, from such estimate or calculation the claims of the complainants made in the bill and of other unsecured creditors who had special contracts with the attorneys or settled with them, and also such claims purchased from creditors by Branch and others as were not filed for allowance under the decree; and that five per cent upon the sum realized by the suit was a sufficient allowance for attorney's fees. *Central R. R. v. Pettus*, 118 U. S. 116.

CAMERON

v.

TOME.

(*Advance Case, Maryland. February 5, 1886.*)

A railroad company not having sufficient money to pay all the coupons falling due upon its first mortgage bonds, the president of the company borrowed money of the plaintiff to make up the deficiency, and to secure him for the loan gave him the coupons in question, which were a part of the same coupons that had been previously paid by the company and delivered up to its secretary for retirement and cancellation. *Held*, that plaintiff was not to be treated as a purchaser of the coupons, and that the coupons in question were not entitled to the benefit of the lien of the first-mortgage bonds.

As against bondholders who have presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to take them up under an undisclosed agreement with the company, that the coupons should be delivered to him uncanceled as security for his advances, is not entitled to an equal priority in the lien, or the proceeds of the mortgage by which the coupons are secured.

APPEAL from the circuit court of Baltimore city.

The opinion states the case.

Archibald Sterling, Jr., for appellant.

Thomas W. Hall and *Charles Marshall*, for appellees.

ROBINSON, J.—The franchises and property of the People's Passenger R. Co. were sold under foreclosure proceedings instituted by the second-mortgage bondholders. The sale was made subject to a first mortgage by the company to Jacob Tome, trustee, to secure the payment of the principal and interest of \$100,000 coupon bonds; and John W. Hall became the purchaser. Hall subsequently conveyed the property to the People's R. Co., a new and distinct corporation.

The appellant is the holder of certain interest coupons of the first-mortgage bonds of the face value of \$2745; and these coupons he claims are entitled to the lien of the first mortgage upon the property of the People's Passenger R. Co. The auditor and master to whom the papers were referred to state an account was upon the proof submitted to him of the opinion that the coupons held by the appellant were not entitled to the lien of the first mortgage; and that they were acquired by the appellant under such circumstances as to entitle him only to a claim against the company for money loaned.

This appeal is taken from a *pro forma* decree ratifying the report of the auditor and master. In support of the lien now claimed by him the appellant contends that the coupons were purchased by him from the first-mortgage bondholders, and constitute, therefore, a part of the mortgage debt. The appellees, on the other hand contend that the coupons were presented by the holders thereof at the company's office for payment in pursuance of a notice published by the company in the newspapers that they would, upon such presentation, be paid; that they were so paid by the proper officer of the company, and were accordingly delivered to him for retirement and cancellation, and not for assignment.

Is the appellant to be treated as a purchaser of the coupons in controversy? We think not. His own admissions, the admis-

APPELLANT NOT
A PURCHASER OF
COUPONS.

sions of the company, and the proof before the auditor and master are all against any such contention. Tome, the trustee in the first mortgage, in the cross-bill filed by him, expressly charges that the company, being without means to pay the interest coupons falling due January 1, 1883, its president made an arrangement with the appellant whereby the latter was to advance the money to William H. Patterson, the secretary of the company, to take up said coupons, and which were to be delivered to the appellant, to be held by him as his property until the company should be able to raise the money to pay the same. He further charges that, in pursuance of this arrangement, an advertisement was published, signed by W. H. Patterson, as secretary of the company, notifying the holders of the first-mortgage bonds to present their coupons at the company's office for payment, and that certain bondholders, in ignorance of the arrangement made with the appellant, presented and delivered their coupons

to Patterson, the secretary, as they supposed, for retirement and cancellation, receiving from him the money therefor. The bill then charged that the whole arrangement was but a cloak to conceal the fact of a default having been made and to avoid the consequences thereof, and that it was in fraud of the rights of the first-mortgage bondholders.

The answer of the company to the cross-bill of Tome admits the facts set forth in the bill, but denied that the arrangement was fraudulent. The answer of the appellant admits also the facts stated, except that it denies all fraud, combination, or improper motive in respect to the coupons, and alleges "that the money which was paid by the officers of the defendant company to the bondholders who delivered to them coupons due January 1, 1883, was the money of the said J. D. Cameron, advanced by him to the company, and the said coupons are now held by him under the arrangement stated in the bill." In addition to these admissions on the part of the company and the appellant himself, the proof taken before the auditor and master shows beyond question that the coupons were presented by the first-mortgage bondholders at the company's office for payment, and that they were in fact paid by its secretary and were delivered to him for retirement and cancellation. The Messrs. Hambleton, in presenting \$660 of these coupons, notified the secretary of the company that they were presented for payment and cancellation by the company, and not for sale, and that unless so paid by the company they would not be surrendered. To this Patterson replied, "I am the secretary of the company, and advertised that I was paying the coupons, which I am doing."

There is not a particle of proof to show that the holders of these coupons ever sold or agreed to sell them to the appellant, or that they were delivered to him with their knowledge or assent. They were due, and it was the duty of the company to pay them. They constituted, so long as they remained unpaid, a part of the mortgage debt, and an accumulation of unpaid interest would necessarily affect the value of the security held by the first-mortgage bondholders. They had, therefore, a direct interest in having them paid and extinguished. The appellant advanced it is true the money to pay them, but he was a large holder of the second-mortgage bonds, and was anxious to avoid a default on the part of the company, which might lead to a foreclosure and sale of the property of the company by the first-mortgage bondholders. Besides, the agreement was one made between him and the company, and was unknown to the holders of the coupons when they presented them for payment. This being so, we take the law to be well settled, that as against bondholders who presented their coupons for payment and not for sale, and who had the right to assume that they were paid and extinguished, a person who advances the money to

take them up under an undisclosed agreement with the company that the coupons should be delivered to him uncanceled as security for his advances, is not entitled to an equal priority in the lien, or the proceeds of the mortgage by which the coupons are secured. *Union Trust Co. v. Monticello & Port Jervis R. Co.*, 63 N. Y. 311; *Haven v. Grand Junction R. Co.*, 109 Mass. 96; *Ketchum v. Duncan*, 97 U. S. 662.

But admitting this be so, it is further contended that the proceedings in this case show that the first-mortgage bondholders whose coupons were taken up by the company and the money advanced by the appellant have, for a good and sufficient consideration, ratified the transaction as a purchase, and have agreed that he should hold them as unpaid coupons, with the same priority as all other coupons under the first mortgage. This contention is, we think, equally unfounded. From the filing of the bill for foreclosure and sale by the second-mortgage bondholders, to the sale made by the trustees under the final decree of the court, at each and every step of this protracted litigation, the lien now claimed by the appellant has been resisted and denied by the first-mortgage bondholders. Prior to the passing of the final decree, the papers were referred to Daniel M. Thomas, Esq., auditor and master, to state an account of all the liens and incumbrances resting upon the property. In stating this account the auditor and master says, "the coupons for \$2745 falling due January 1, 1883, and held by J. D. Cameron have not been treated as entitled to the lien of the first mortgage of the company, because the evidence shows they were paid and held by the said Cameron under circumstances which only entitled him to a claim against the company for money loaned."

This report was ratified by the court except that portion of it relating to the lien of the coupons held by the appellant, which question was reserved for further consideration, and the trustees were then directed to sell the franchises and property of the company, subject to the first mortgage made to Tome, trustee, to secure the payment of the principal and interest of the \$100,000 coupon bonds. And when the property was offered for sale under this decree, the trustees stated that in accordance with the liens of the decree, reserving the question of Cameron's coupons for future determination, the purchaser would have the right to contest the lien of said coupons. There is nothing certainly to be found in these proceedings from which it can be inferred that the bondholders acknowledged these coupons to be a lien on the property. Nor is there anything to be found in the agreement between the appellant and the trustees under the first and second mortgage. It is merely an agreement between all parties, that the lien claimed by Cameron shall be considered and determined by the court, unaffected in any manner by the

RATIFICATION OF
BONDHOLDERS.

COUPONS AS A
LIEN.

charge of combination and fraud alleged in the cross-bill filed by Tome. In other words, it was a withdrawal of the charge of fraud thus made. The deed from the trustees to Hall, the purchaser, conveys the property and franchises of the company, subject to the first mortgage, to Tome, "to the amount of \$100,000, for the principal of said mortgage, and of \$3000, of interest thereon due on the first day of January, 1883, and of a like amount of interest due on the first day of July, 1883." And so does the deed from Hall to the People's R. Co. But these deeds convey in precise terms the property as decreed by the court, *totidem verbis*, and by the decree the question as to the appellant's lien was expressly reserved for the further consideration of the court. So taking the deeds and decree together there is nothing to justify the inference that the parties thereto admitted the \$2745 interest coupons of January 1, 1883, now held by the appellant, were entitled to the lien of the first mortgage. In any aspect in which the case may be considered we are of opinion that these coupons are not a lien protected by the first mortgage.

Decree affirmed.

Coupons presented for Payment and taken up by One who advanced Money.—Coupons which the bondholders had presented for payment, and which they had reason to suppose were paid by the company, are not entitled to share in the proceeds of a sale as against such bondholders, although they were in fact taken up by one who advanced the money under an agreement that they were to be delivered to him uncanceled as security for the advances. *Jones on Railroad Securities*, §§ 329, 330, 331; *Union Trust Co. of New York v. Monticello, etc., R. Co.*, 63 N. Y. 311; *Virginia v. Chesapeake & Ohio Canal Co.*, 32 Md. 501.

In *Haven v. Grand Junction R. Co.*, 109 Mass. 88, such a course was adopted; and the belief thereby created, that the company was able to pay, and did pay, the coupons at maturity was held and acted on by another corporation in subsequent purchases of the bonds from individual holders of them; but these purchases were made at or below the par value of the bonds and accrued interest, and were not made till between eight and nine years afterwards, and then with a view to acquire title to lands which constituted the mortgaged security, and which this corporation had voted to buy. *Held*, that after a judicial sale of the lands, upon foreclosure of the mortgage the person who advanced the money was not estopped to maintain a claim for the amount of the coupons paid by him, with interest from the date of payment, against a surplus of the proceeds of the sale remaining after full satisfaction of the claims of all the other creditors.

There is, however, no presumption that the coupons have been paid and cancelled, when the transaction on its face is a transfer rather than a payment. In *Ketchum v. Duncan*, 96 U. S. 659, it was held that a corporation which had previously paid its coupons at its own office directed the holders to take the coupons to a bank where they would receive payment, and the holders there received the amounts due on the coupons and left them in possession of the bank, they might properly presume that the company was not paying the coupons. That inasmuch as the holders of the coupons received from the corporation no checks upon the bank, they must have known that the bank had no vouchers for its payments unless the coupons continued in force after the bank received them; and hence it is regarded as a fair pre-

sumption, that when they delivered the possession they assented to a transfer of ownership. Mr. Justice Strong, in delivering the opinion of the court, said: "It is within common knowledge that interest coupons, alike those that are not due and those that are due, are passed from hand to hand, the receiver paying the amount they call for without any intention on his part to extinguish them, and without any belief in the other party, that they are extinguished by the transaction. In such a case the holder intends to transfer his title, not to extinguish the debt. In multitudes of cases, coupons are transferred by persons who are not the owners of the bonds from which they have been detached. To hold that in all these cases the coupons are paid and extinguished, and not transferred or assigned, unless there was something more to show an assent of the person parting with the possession that they should remain alive and be available in the hands of the person to whom they were delivered, would, we think, be inconsistent with the common understanding of business men."

LITTLEFIELD *v.* BLOXHAM *et al.*, Trustees.

REED *v.* SAME.

(*Advance Case, U. S. Supreme Court, March 29, 1886.*)

The trustees of the internal-improvement fund of the State of Florida having sold certain railroads for the purpose of taking up a State indebtedness with the purchase money, and such purchase money not being thereafter paid, any of the bonds of the State sought to be canceled as remain in the hands of the purchasers are under the control of the trustees rather than the holders.

APPEALS from the Circuit Court of the United States for the Northern District of Florida.

H. Bisbee for Littlefield.

J. Aug. Johnson for Reed.

Wayne Mac Veagh for Bloxham and others.

WAITE, C. J.—These appeals relate to the ownership of \$103,000 in amount of certain bonds of the Pensacola & Georgia R. Co. and the Tallahassee R. Co. For convenience they will be hereinafter referred to as "one hundred and three bonds." Many of the matters involved were under consideration by this court in *Florida v. Anderson*, 91 U. S. 667, and *Railroad Companies v. Schutte*, 103 U. S. 118, to which reference is made for a general history of the transactions out of which the present controversy arose.

The facts on which the rights of these parties depend we find to be as follows: The railroads of the two companies above named were sold by the trustees of the internal-improvement fund of the State of Florida, on the twentieth of March, 1869, under the provisions of the internal-improvement act of Florida, passed January 6, 1855, to pay certain bonds, of which those now in dispute

are a part. A statement of the provisions of this act will be found in the report of the case of *Florida v. Anderson*, beginning at page 670. A conveyance of the railroads to the purchasers at the sales was obtained, to use the language of the counsel for the appellant in *Littlefield's Case*, "through a well-planned and cleverly-executed fraud," without the payment of about \$472,000 of the purchase money. This sum represented an equal amount of bonds outstanding, which included the 103 now in question. A history of the facts connected with this transaction will be found in the report of *Railroad Companies v. Schutte*, beginning at page 121. George W. Swepson was under obligations to pay what remained due on the purchase money, or, which is the same thing, to get up and surrender to the trustees of the internal-improvement fund the outstanding bonds for cancellation.

On the twenty-fourth day of June, 1869, an act was passed by the general assembly of Florida, by which George W. Swepson, Milton S. Littlefield, and their associates, were incorporated under the name of the Jacksonville, Pensacola & Mobile R. Co. The important provisions of the charter of this company will be found in the report of the *Schutte Case* at page 123, and following. Afterwards the title to the two railroads which had been purchased was transferred to the corporation thus created. On or before the tenth of November, 1869, Milton S. Littlefield succeeded to all the rights of George W. Swepson in the premises, and became bound to take up and surrender the outstanding bonds, or pay the balance due on the purchase money in cash.

On the second day of August, 1869, drafts were drawn by George W. Swepson on and accepted by Milton S. Littlefield, in favor of Edward Houston, for \$109,140. These drafts grew out of transactions between the parties relative to the Jacksonville, Pensacola & Mobile R. Co. and the Florida Central R. Co., and in some way Houston held 110 of the bonds of the Pensacola & Georgia R. Co. and Tallahassee R. Co. as collateral security. These bonds were part of those outstanding which Swepson was bound to take up and surrender, and they included the 103 now involved. The drafts were likewise among the obligations which Littlefield assumed to pay when, in November following, he took Swepson's place in these transactions.

On the thirteenth of May, 1870, Littlefield entered into a contract with Houston, by which he bought the drafts above mentioned, and certain shares of the stock of the Florida Central R. Co., and gave his draft for \$163,020.70 on S. W. Hopkins & Co., the financial agents of the Jacksonville, Pensacola & Mobile Co., therefor. Under this contract Houston was to hold the 110 bonds as collateral for the draft then given, and to deliver them to Littlefield when this draft was paid. Various other contracts were afterwards made between Littlefield and Houston which looked to

a payment of a draft through the securities of the Florida Central R. Co., but no payment was in fact made before June 8, 1870, when Littlefield, as president of the Jacksonville, Pensacola & Mobile Co., was in negotiation with Harrison Reed, governor of Florida, for an exchange of the bonds of the company for those of the State, under the provisions of the charter. In the progress of these negotiations it was found that the unpaid purchase money stood in the way of the exchange, and thereupon Littlefield, still acting as president of the company, addressed a letter to the governor, who was also *ex officio* one of the trustees of the internal improvement fund, a copy of which is as follows :

"TALLAHASSEE, FLA., June 8, 1870.

"*Hon. Harrison Reed, Gov. State of Florida*—SIR : I have the honor to state that in addition to the bonds of the Pensacola & Georgia and Tallahassee railroad companies already deposited with the board of trustees of the internal-improvement fund, I have at the railroad office \$41,350.

Bro't over,	-	-	-	-	-	-	-	\$41,350
And have secured,	-	-	-	-	-	-	-	\$110,000
"	"	-	-	-	-	-	-	70,000
"	"	-	-	-	-	-	-	15,000
								<hr/> 195,000
								<hr/> \$227,350
Total outstanding,	-	-	-	-	-	-	-	\$227,350

"Respectfully,

M. S. LITTLEFIELD,

"Pres't J., P. & M. R. Co."

The \$110,000 bonds here referred to were those held under the contracts between Littlefield and Houston. After this letter Littlefield delivered to the governor a draft, of which the following is a copy :

"\$227,250.

TALLAHASSEE, June 8, 1870.

"On demand, when in funds, pay to the order of his excellency, Harrison Reed, Gov., two hundred and twenty-seven thousand two hundred and fifty dollars, value received, and charge the same to account of

"M. S. LITTLEFIELD,

"Pres't J., P. & M. R. Co.

"To Messrs. S. W. Hopkins & Co., 71 Broadway, N. Y."

This draft was never paid, but on its delivery the exchange of bonds of the State for those of the company was made by the governor, acting for the State, and by Littlefield, acting for the rail-

road company. Out of this exchange the suits of *Florida v. Anderson and Railroad Companies v. Schutte* arose, as well as much other litigation in the courts of the State and of the United States.

After the delivery of the State bonds to Littlefield the draft of \$163,020.70 held by Houston was paid by Hopkins & Co. out of the proceeds of the sale of these bonds, or upon their security, and on the twelfth of April, 1871, an agreement was made between Houston and S. W. Hopkins & Co., the drawees, by which the 103 bonds in question were deposited with Mariano D. Papy, to be held by him, and not delivered to any person unless directed to do so by M. S. Littlefield and S. W. Hopkins & Co., jointly, or unless directed to be delivered to Littlefield by Hopkins & Co., or to Hopkins & Co. by Littlefield. It was also further agreed that there should be no delivery to Littlefield until certain suits which had been begun against Houston, and which were particularly described, had been dismissed. On the fourteenth of June, 1872, Papy was directed by Hopkins to deliver the bonds to Littlefield on the dismissal of the suits. It was stipulated at the hearing of the present case below that these suits had then been dismissed, but at what precise time does not appear.

On the seventeenth of July, 1872, Edward C. Anderson, Jr., and others, holders of some of the \$472,000 of unpaid bonds, began a suit in the circuit court of the United States for the northern district of Florida, for themselves and all other holders of like bonds who might choose to become parties plaintiff, on the usual terms, against the Jacksonville, Pensacola & Mobile R. Co. and others, including Milton S. Littlefield and the trustees of the internal-improvement fund, to subject the railroad of the railroad company, defendant, to the payment of their bonds. On the same day the 103 bonds in the hands of Papy were by him delivered, under an order of the superior court of Chatham county, Georgia, to "T. Mayhew Cunningham, cashier of the Central Railroad & Banking Co. of Georgia, to be by him deposited in the vault of the said bank, and there to be safely kept subject to the further order of the court." Afterwards, in April, 1873, they were deposited by Cunningham with the circuit court of the United States for the northern district of Florida, subject to the orders of that court in the Anderson suit, where they have ever since remained.

On the eighteenth of June, 1875, the following order in reference to these bonds was entered in the Anderson suit: "It is further ordered that the said master shall give immediate notice through the public gazettes heretofore used by him for such purpose to all parties who may claim an interest, direct or indirect, in the bonds which have been deposited with him by T. Mayhew Cunningham, trustee; that he hold said bonds in his custody subject to the final order of this court; that the said bonds are

claimed by the trustees of the internal-improvement fund as having been purchased from Edward Houston by the Jacksonville, Pensacola & Mobile R. Co., under agreement with said trustees, for the purpose of cancellation; that upon petition filed with him the said master, and ten days' notice to the said trustees, and at any time before the first day of the next term of the court, he will take testimony touching the claim or interest or title of any such petitioner upon or to the said bonds, or any part thereof; and that unless petition be filed in accordance with this order, all right, title, and interest of any such person to or in the said bonds would be forever adjudged to be barred." The notice required by this order was duly given, and on the thirteenth of July, 1876, the trustees of the internal improvement fund filed their petition in the master's office, asking that the bonds be delivered to them, claiming title under the transaction between Littlefield and the governor on the eighth of June, 1870, at the time of the exchange of bonds, and also under a decree of the circuit court of Duval county, Florida, on the twentieth of August, 1875, in a suit brought by them on the twentieth of March, 1872, against the Jacksonville, Pensacola & Mobile R. Co., Milton S. Littlefield, and others, in which their right to the bonds under their claim was fully established as against all the parties to that suit. Calvin Littlefield was, however, not a party.

On the eighteenth of March, 1872, John H. Miller began a suit against Milton S. Littlefield in the circuit court of Duval county, Florida, to recover a debt of \$50,000. In this suit a judgment was rendered April 18, 1872, for \$50,708, and on the fifteenth of November, 1872, Miller filed a creditors' bill in the circuit court of the United States for the northern district of Florida to subject the 103 bonds to the payment of the judgment as the property of Milton S. Littlefield. Under this bill a decree was rendered December 2, 1873, directing a sale of the bonds for that purpose. Afterwards, on the fifth of August, 1875, the bonds were sold to Robert J. Washington, whereupon he appeared in the Anderson suit, and asked leave to defend his interest and title. Washington afterwards, on the twenty-second of December, 1881, assigned his interest in the bonds to Edward J. Reed.

On the twenty-third of May, 1877, J. Fred. Schutte and others, holders of State bonds given in exchange for the bonds of the Jacksonville, Pensacola & Mobile R. Co., brought a suit in the circuit court of the United States for the northern district of Florida for the foreclosure of the statutory lien of the State as security for the bonds of the railroad company given in exchange for those of the State. In the bill it was claimed, among other things, that this lien of the State was superior to that of the trustees of the internal-improvement fund for the balance of the original purchase money, and as to the 103 bonds the following

avermment was made: "Complainants are informed and believe that said defendant, Milton S. Littlefield, made some agreement with said George W. Swepson to perform the obligations which the latter undertook with said trustees to do, viz., to purchase said unpaid Pensacola & Georgia and Tallahassee railroad companies' bonds; that said Littlefield did in fact purchase of said Edward Houston one hundred and three of said bonds in performance of such contract, which bonds are now deposited in the registry of this court to the credit of a cause therein pending, in which Edward C. Anderson *et al.* are plaintiffs, and the Jacksonville, Pensacola & Mobile Co. *et al.* are defendants; that said bonds are claimed by divers persons under some contract with said Littlefield, which persons had full knowledge that said bonds were paid for out of the money for which the bonds issued by Governor Reed to the said Jacksonville, Pensacola & Mobile Co. were sold as before set forth. Said one hundred and three bonds have never been in the actual possession of said Littlefield. Complainants are advised that they should be delivered to said trustees of the internal-improvement fund, and they should take such proceedings as may be necessary to procure the same to be done."

On the thirty-first of May, 1879, a decree was entered in the cause declaring that the trustees of the internal-improvement fund had a first lien on the property of the Jacksonville, Pensacola & Mobile Co., "to secure the payment to said trustees of the sum of \$463,175.27, and interest thereon since March 20, 1869, at the rate of eight per cent per annum," and directing a sale for the benefit of the Schutte bondholders, subject to this prior lien. This prior lien was on account of the unpaid purchase money at the original sale, and the amount found due included the 103 bonds; but there was no express adjudication as to the ownership of these bonds, or as to the right of the railroad company or of the Schutte bondholders to have them applied towards the satisfaction of the debt to the trustees. From this decree the Schutte bondholders did not appeal, but on appeals by some of the other parties to the suit the decree was affirmed by this court January 17, 1881, (*Railroad Companies v. Schutte*), and under its authority the road was afterwards sold.

On the fourteenth of February, 1882, Calvin Littlefield filed in the Anderson suit a petition to have the 103 bonds delivered to him, and in his petition he stated that the trustees of the internal-improvement fund and Edward J. Reed also claimed an interest. As to his own title, he stated that on the thirteenth of July, 1871, Milton S. Littlefield assigned the bonds "in possession and control of M. D. Papy" to him as security for the payment of a debt of \$50,000, and that on the eleventh of January, 1872, this assignment was made absolute, "that the expenses of a foreclosure may be avoided."

The evidence shows that while the suit of *Miller v. Littlefield*, above referred to, was pending, and under which the bonds were sold to Washington, these title papers of Calvin Littlefield were sent by him to J. J. Finlay, an attorney at law at Jacksonville, Florida, for some purpose, and that under date of December 24, 1873, Finlay wrote a letter to Littlefield which contained the following: "As General Littlefield had not yet been examined before the master in chancery in the matter of the creditors' bill, about which I wrote you in my last, the agreement above mentioned reached me in time to enable him to answer more fully and satisfactorily as to the ownership of the stocks and bonds mentioned in said agreement. He will answer that these securities belong to you and not to him. I am of the opinion that you are the *bona-fide* owner of these securities under and by virtue of said agreement, and that any decree made in the case of *Miller v. M. S. Littlefield* is not binding on you, for the reason that you were not, and are not, a party to said suit. For the present, therefore, I do not see that it is necessary to take any step, or incur the expense of any independent proceeding in the matter. As things progress, however, if it should become important for the protection of your interests to institute proceedings, it can be done."

It does not appear that Calvin Littlefield gave any notice of this assignment to Papy while the bonds were in his hands, or to any one else claiming an adverse interest prior to the filing of his petition. Edward J. Reed answered the petition, setting up his title as the assignee of Washington, and asking that the bonds be delivered to him. The trustees of the internal-improvement fund also answered, setting up their title, and asking that the bonds be surrendered to them, and credited on the decree in the Schutte Case, "as of and for the amount due on said bonds, principal and interest, on the twelfth of April, 1871."

The circuit court, on the twenty-third of June, 1882, decreed that the bonds be surrendered to the trustees of the internal-improvement fund, and applied in accordance with the prayer of their answer. From this decree Calvin Littlefield and Edward J. Reed took appeals, which have been docketed here as separate causes.

Upon the facts found, and about which there is substantially no dispute, we have no hesitation in affirming the action of the circuit court. Although the contracts under which the bonds passed from the hands of Houston to Papy, and from Papy to the circuit court, in the Anderson suit, were in the name of Milton S. Littlefield, all payments for the bonds after June 8, 1870, were made from the funds of the Jacksonville, Pensacola & Mobile Co. What was done by Littlefield at the time of the exchange of bonds with the governor had the effect of transferring the 103 bonds to the trustees of the internal im-

BONDS HELD FOR
TRUSTEES.

provement fund, subject to the lien of Houston as security for his draft of \$163,020.70. When that draft was paid and the lien satisfied, the equitable title of the trustees was perfected, and thereafter the bonds were held by Papy, and his successors in possession, for them. It follows that at the time Littlefield undertook to transfer the bonds to Calvin Littlefield he had nothing to transfer. All his interest had long before been passed to the trustees. Neither does Calvin Littlefield occupy the position of a purchaser without notice of the prior claim of the trustees, because when he took his title the bonds were in the possession of Papy, who was in legal effect trustee for whom it might concern. The same is true of the claim under which Edward J. Reed holds. When the bill was filed by Miller to subject the bonds to the payment of his judgment against Littlefield, they belonged to the trustees, and not to Littlefield, and consequently nothing passed by the sale in that suit.

It is contended, however, that as the trustees "insisted in the Schutte Case on a lien for the full amount of the unpaid purchase money which was decreed to them, and that the 103 bonds were outstanding," they "are estopped now from claiming that these 103 bonds should be delivered to them and cancelled, and a credit given therefor on such decree." This, it is claimed, amounted to an abandonment by the trustees of their title to the bonds under the arrangement between Littlefield and the governor, which inured to the benefit of Milton S. Littlefield or his assigns. To this we cannot agree. No issue was made in that suit as to the actual ownership of the bonds. The trustees of the improvement fund did not claim that they were not entitled to the bonds, nor that the amount due on them should not be credited on the account for unpaid purchase money if their title should be established, but that until it was established no such credit should be given. Neither did the Schutte bondholders claim that the credit should be given at once, but that the necessary proceedings be had to establish the title and thus secure the application. When the decree was rendered the title had not been settled, and so no credit was then allowed; but nothing was done to prevent the trustees from making good their claim, then pending in the Anderson suit, and, if successful, from giving the proper credit on the decree. That is what they are seeking to do here. Having presented their petition for a delivery of the bonds, they were met by the counter-petitions of Calvin Littlefield and Reed, and thus the rights of all the parties have been presented for final adjudication. The question involved is not one of security, but of title. The bonds are held by the court for whom it may concern, and the point to be settled is, to whom shall they be delivered? Aside from the claim of abandonment put forth by Calvin Littlefield, they belong, as we have

NO ABANDON-
MENT BY TRUS-
TEES.

seen, to the trustees of the improvement fund, as Milton S. Littlefield, the common source of title, first conveyed to them. It is conceded that the trustees have never actually reconveyed to Milton S. Littlefield; neither have they executed any formal conveyance or release to Calvin Littlefield. All they have done is to take a decree in their favor for what would be due them if their title should fail; and this, while a suit was pending to establish that title. Other parties were foreclosing a mortgage junior to theirs, and it became necessary to fix the amount of their prior lien. This the other parties were willing should be done before their disputed title was settled, and so, to save themselves from loss in case of defeat, they took a decree for what would be their due in that event. To that the junior mortgagees did not object. Their effort had been to defeat the prior lien altogether. Having failed in that, they were willing to submit to a decree for the larger amount leaving the disputed question as to the 103 bonds to be settled afterwards in the proceeding that had been begun for that purpose, or any other that might be instituted. This was not an abandonment by either party. The decree was silent as to these bonds, and the petition for their delivery to the trustees on file in the Anderson suit, where the bonds were, was allowed to remain. It is now being prosecuted by the trustees as a mode of obtaining satisfaction of the decree in their favor. If they succeed, it may inure to the benefit of the purchasers at the sale under the Schutte decree, but of this Calvin Littlefield has no right to complain. If he did not own the bonds, it is a matter of no importance to him what disposition the trustees may make of them. All his rights depend alone on his ownership. If he is not the owner, he is entirely out of all the litigation between the rest of the parties. Neither the railroad company nor the Schutte bondholders, who are alone interested in the amount for which the sale was made, are here to complain. The trustees alone can control the bonds. Having protected all who had the right to look to the original unpaid purchase money for the satisfaction of their bonds, they have performed their whole duty as trustees, so far as the bondholders are concerned.

The decree of the circuit court is affirmed.

STEVENS

v.

RAILROAD COMPANIES.

(114 *United States Reports*, 664.)

The statutory lien with which the State of Tennessee was invested upon the issue of its bonds to railroad companies under the internal-improvement act of February 11, 1852, and the several acts amendatory thereof, bound the property of the company, to which the issue was made, for the payment of the bonds so issued, and the interest thereon, not to the several holders thereof, but only to the State.

APPEALS from the circuit courts of the United States for the Eastern, Middle, and Western Districts of Tennessee.

George Hoadly, Wager Swayne, E. L. Andrews, J. C. F. Gayner, E. M. Johnson, and Edward Colston for appellants.

C. F. Southmayd, Ed. Baxter, Wm. M. Ramsey, E. H. East, P. Hamilton, John A. Campbell, Wm. M. Baxter, L. W. Humes, D. H. Poston, W. K. Poston, J. B. Heiskell, Geo. Brown, and James Fentress for appellees.

WAITE, C. J.—These are suits brought by the holders of unpaid bonds of the State of Tennessee, issued to various railroad companies under the act of February 11, 1852, “to establish a system of internal improvements,” to enforce the lien which FACTS was vested in the State by that act on the property of the companies respectively as security for the payment of the bonds, and the accruing interest thereon. The sections of the act on which the rights of the parties depend are 1, 2, 3, 4, 5, 6, 7, 10, 12, 13, and 14. These are as follows:

“Section 1. Be it enacted by the general assembly of the State of Tennessee that whenever the East Tennessee & Virginia R. Co. shall have procured *bona-fide* subscriptions for the capital stock in said company to an amount sufficient to grade, bridge, and prepare for the iron rails the whole extent of the main trunk line proposed to be constructed by said company, and it shall be shown by said company to the governor of the State that said subscriptions are good and solvent, and whenever said company shall have graded, bridged, and shall have ready to put down the necessary timbers for the reception of rails, and fully prepared a section of thirty miles of said road at either terminus, in a good and substantial manner, with good materials, for putting on the iron rails and equipments, and the governor shall be notified of these facts, and that section, or any part thereof, is not subject to any lien whatever, other than those created in favor of the State by the acts of

1851-52, by the written affidavit of the chief engineers and president of said company, together with the written affidavit of a competent engineer by him appointed, at the cost of the company, to examine said section, then said governor shall issue to said company coupon bonds of the State of Tennessee, to an amount not exceeding eight thousand dollars per mile on said section, and on no other condition, which bonds shall be payable at such place in the United States as the president of the company may designate, bearing an interest of six per centum per annum, payable semi-annually, and not having more than forty nor less than thirty years to mature.

"Sec. 2. Be it enacted, that the bonds before specified shall not be used by said company for any other purpose than for procuring the iron rails, chairs, spikes, and equipments for said section of said road, and for putting down said iron rails, and the governor shall not issue the same unless upon the affidavit of said president, and a resolution of a majority of the board of directors, for the time being, that said bonds shall not be used for any other purpose than for procuring the said iron rails, chairs, spikes, and equipments for said section, and for putting down said iron rails; and the governor shall have power to appoint a commissioner to act, under oath, in conjunction with said president, in negotiating said bonds for the purposes aforesaid, and to act in any other matters pertaining to said company where the interest of the State, in the opinion of the governor, may require it.

"Sec. 3. Be it enacted, that so soon as the bonds of the State shall have been issued for the first section of the road as aforesaid, they shall constitute a lien upon said section so prepared as aforesaid, including the road-bed, right of way, grading, bridges, and masonry, upon all the stock subscribed for in said company, and upon said iron rails, chairs, spikes, and equipments when purchased and delivered; and the State of Tennessee, upon the issuance of said bonds, and by virtue of the same, shall be invested with said lien or mortgage without a deed from the company for the payment by said company of said bonds, with the interest thereon as the same becomes due.

"Sec. 4. Be it enacted, that when said company shall have prepared, as aforesaid, a second section, or any additional number of sections, of twenty miles each of said road, connecting with a section already completed for the iron rails, chairs, spikes, and equipments, as provided in the first section of this act, and the governor shall be notified of the facts, as before provided, he shall, in like manner, issue to said company like bonds of the State of Tennessee, to an equal amount with that before issued under the first section of the act, for each and every section of twenty miles of said road so prepared, as aforesaid, but upon the terms and conditions hereinbefore provided: and upon the issuance of the said bonds the

State of Tennessee shall be invested with a like mortgage or lien, without a deed from said company, upon said stock, and upon said first and additional section or sections of said road so prepared, upon the rails and equipments put, or to be put, upon the same, for the payment of said bonds and the accruing interest thereon: provided, that if the last section of said road shall be less than twenty miles, or if the railroad proposed to be constructed by any company hereinafter specified shall be less than thirty miles in extent, bonds of the State shall be issued for such section, or such railroad, as may be less than thirty miles in extent for an amount in proportion to the distance, as provided in this act, but upon the same terms and conditions, in all respects, as required in regard to the bonds to be issued for the other sections of said road. And when the whole of said road shall be completed, the State of Tennessee shall be invested with a lien, without a deed from the company, upon the entire road, including the stock, right of way, grading, bridging, masonry, iron rails, spikes, chairs, and the whole superstructure and equipments, and all the property owned by the company as incident to or necessary for its business, and all depots and depot stations, for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds. And after the governor shall have issued bonds for the first section of the road, it shall not be lawful for the said company to give, create, or convey to any person or persons, or body corporate whatever, any lien, incumbrance, or mortgage of any kind, which shall have priority over, or come in conflict with, the lien of the State herein secured; and any such lien, incumbrance, or mortgage shall be null and void as against said lien or mortgage of the State, which shall have priority over all other claims existing or to exist against said company.

“Sec. 5. Be it enacted, that it shall be the duty of said company to deposit in the bank of Tennessee, at Nashville, at least fifteen days before the interest becomes due, from time to time, upon said bonds issued as aforesaid, an amount sufficient to pay such interest, including exchange or necessary commissions, or satisfactory evidence that said interest has been paid or provided for; and if said company fail to deposit said interest as aforesaid, or furnish the evidence aforesaid, it shall be the duty of the comptroller to report that fact to the governor, and the governor shall immediately appoint some suitable person or persons, at the expense of the company, to take possession and control of said railroad, and all the assets thereof, and manage the same and receive the rents, issues, profits, and dividends thereof, whose duty it shall be to give bond and security to the State of Tennessee, in such penalty as the governor may require, for the faithful discharge of his or their duty as receiver or receivers, to receive said rents, issues, profits, and dividends, and pay over the same, under the direction of the gov-

error, towards the liquidation of such unpaid interest. And if said company fail or refuse to deliver up said road to the person or persons so appointed by the governor, the person so appointed shall report that fact to the governor, who shall forthwith issue his warrant, directed to the sheriffs of the counties through which the road shall run, commanding them to take possession of said road, fixtures, and equipments, and everything pertaining thereto, and place the said receiver in full and complete possession of the same, and said receiver so appointed shall continue in the possession of said road, fixtures, and equipments, and run the same, and manage the entire road, until a sufficient sum shall be realized, exclusive of the costs and expenses incident to said proceedings, to pay off and discharge the interest as aforesaid due on said bonds, which being done, the receiver shall surrender said road and fixtures and equipments to said company. The comptroller shall from time to time settle the accounts with the receiver, and the balance shall be deposited in the treasury of the State. The comptroller is authorized, and it is made his duty, upon his warrant to draw from the treasury any sum of money necessary to meet the interest on such bonds as may not be provided for by the company, as provided for in this act, and the comptroller shall report thereof to the general assembly from time to time.

"Sec. 6. Be it enacted, that if said company shall fail or refuse to pay any of said bonds when they fall due, it shall be the duty of the governor to notify the attorney-general of the district in which is situated the place of business of said company of the fact; and thereupon said attorney-general shall forthwith file a bill against said company, in the name of the State of Tennessee, in the chancery or circuit court of the county in which is situated said place of business, setting forth the facts, and thereupon said court shall make all such orders and decrees in said cause as may be deemed necessary by the court to secure the payment of said bonds, with the interest thereon, and to indemnify the State of Tennessee against any loss on account of the issuance of said bonds, by ordering the said railroad to be placed in the hands of a receiver, ordering the sale of said road and all the property and assets attached thereto or belonging to said company, or in such other manner as the court may deem best for the interest of the State.

"Sec. 7. Be it enacted, that at the end of five years after the completion of said road, said company shall set apart one per centum per annum upon the amount of bonds issued to the company, and shall use the same in the purchase of bonds of the State of Tennessee, which bonds the company shall pay into the treasury of the State, after assigning them to the governor, and for which the governor shall give said company a receipt; and, as between the State and said company, the bonds so paid in shall be a credit on the bonds issued to the company; and bonds so paid in, and

the interest accruing thereon from time to time, shall be held and used by the State as a sinking fund for the payment of the bonds issued to the company; and should said company repurchase any of the bonds issued to it under the provisions of this act, they shall be a credit as aforesaid, and cancelled. And should said company fail to comply with the provisions of this section, it shall be proceeded against, as provided in the fifth section of this act."

"Sec. 10. Be it enacted, that the provisions of this act shall extend to and embrace the Chattanooga, Harrison, Georgetown & Charlestown R. Co., the Nashville & Northwestern R. Co., the Louisville & Nashville R. Co., the Southwestern R. Co., the McMinnville & Manchester R. Co., the Memphis & Charleston R. Co., the Nashville & Southern R. Co., the Mobile & Ohio R. Co., the Nashville & Memphis R. Co., the Nashville & Cincinnati R. Co., the East Tennessee & Georgia R. Co., the Memphis, Clarksville & Louisville R. Co., and the Winchester & Alabama R. Co., so far as the main trunk roads to be constructed by said companies lie within the limits of this State, and not otherwise, and said companies shall have all the powers and privileges and be subject to all the restrictions and liabilities contained in this act."

"Sec. 12. Be it enacted, that the State of Tennessee expressly reserves the right to enact by the legislature thereof, hereafter, all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of this act; but in such manner as not to impair the vested rights of the stockholders of the companies.

"Sec. 13. Be it enacted, that it shall be the duty of the governor, from time to time, when there shall be reliable information given to him that any railroad company shall have fraudulently obtained the issuance of bonds of this State, or shall have obtained any of said bonds contrary to the provisions of this act, he shall notify the attorney-general of this State, whose duty it shall be forthwith to institute, in the name of the State, a suit in the circuit or chancery court of the county of the place of business of the company, setting forth the facts; and when the fact shall satisfactorily appear to the court that any of said bonds shall have been fraudulently obtained, or obtained contrary to the true intent, meaning, and provisions of this act, then, and in such case, the court shall order, adjudge, and decree that said road, lying in the State, with all the property and assets of said company, or a sufficiency thereof, shall be sold, and the proceeds shall be paid into the treasury, and it shall be the duty of the comptroller immediately to vest the same in stocks, creating a sinking fund, as provided for in the seventh section of this act; and said company shall forfeit all rights and privileges under the provisions of this

act, and the stockholders thereof shall be individually liable for the payment of the bonds so fraudulently obtained by such company, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such company, excepting such stockholders as may show to the said court that they were ignorant of or opposed to the perpetration of such frauds by the company.

"Sec. 14. Be it enacted, that in the event any of the roads, fixtures, or property belonging to any of said roads shall be sold under the provisions of this act, it shall be the duty of the governor to appoint an agent for the State, who shall attend said sale and protect the interest of the State, and shall, if necessary to protect said interest, buy in said road or property in the name of the State; and in case said agent shall purchase said road for the State, the governor shall appoint a receiver, who shall take possession of said road and property, and use the same as provided for in the fifth section of this act; and said receiver shall settle with the comptroller semi-annually until the next meeting of the general assembly."

On the twenty-first of February, 1852, an act was passed providing for the identification of the bonds to be issued to the several companies under the act of February 11, the material parts of which are sections 7, 8, and 9, as follows:

"Sec. 7. Be it further enacted, that the different internal-improvement companies to whom the bonds of the State may be loaned under the different acts of the present legislature shall pay the expenses of engraving and preparing the same.

"Sec. 8. Be it enacted, that the governor of the State shall cause to be engraved and printed the bonds which may be issued under the acts of the present general assembly, as a loan made to internal improvement companies; and the said bonds shall bear date on the first day of January prior to their issuance, and the coupons thereto shall be payable on the first days of January and July of each year.

"Sec. 9. Be it enacted, that the coupons shall be signed and numbered by the comptroller, and the bonds shall be countersigned, sealed, and numbered by the secretary of State; and upon delivering said bonds to the company authorized to receive the same, the secretary of state shall take a receipt, reciting the number, date, and amount of said bonds in a well-bound book to be deposited in his office, and the comptroller and secretary of state shall each be entitled to receive twenty-five cents for each bond so prepared, to be paid by the party receiving the said bond."

By sections 5 and 6 of an act of February 21, 1856, the sinking fund provisions of the act of 1852 were changed as follows:

"Sec. 5. Be it further enacted, that it shall be the duty of the several railroad companies in this State who have received, or may

hereafter receive, bonds of the State or the indorsement of their bonds by the State, to aid in the construction of their several roads, under the provisions of the act of 1851-52, and the acts amendatory thereto, at the expiration of five years from the issuance or indorsement of their several bonds, annually to set apart and pay over to the treasurer of the State two per cent per annum upon all bonds which have been or may hereafter be issued or indorsed as aforesaid, as a sinking fund for the ultimate redemption of the bonds issued or indorsed as aforesaid; which sinking fund, when paid over, the governor, comptroller of the treasury, and president of the Bank of Tennessee shall invest in the bonds of the State, and reinvest all accruing interest in like securities; and they are hereby constituted a board of commissioners for the management, government, and control of said sinking fund.

"Sec. 6. Be it further enacted, that should any of said railroad companies fail or refuse to comply with the provisions of the fifth section of this act, it shall be the duty of the governor forthwith to notify the attorney-general of the district in which is situated the place of business of said company failing or refusing as aforesaid, of the fact; and thereupon the attorney-general shall immediately proceed against said company to collect said sinking fund, in the manner prescribed in the sixth section of the act entitled 'An act to establish a system of internal improvements in this State,' passed February 11, 1852."

By another act, passed March 20, 1860, the same provisions were further amended as follows:

"Section 1. Be it enacted by the general assembly of Tennessee, that the money or bonds that have heretofore or may be paid by the cities or railroad companies in this State to the sinking-fund commissioners by the first of January, 1860, together with the accruing interest thereon to that date, shall be passed directly to the credit of the party having so paid the same, and be a release to said party for that amount on the debt due by them to the State of Tennessee.

"Sec. 2. Said bonds shall be all cancelled by said commissioners, and if indorsed bonds of any railroad company shall be cancelled as hereinafter provided for the cancellation of State bonds, and shall be delivered over to said company or corporation, taking the president's of said company or the officer's of said company receipt for the same, which receipt shall be filed and the copy of the same placed upon a book which the said commissioners shall keep for that purpose. If State bonds, they shall be cancelled and filed in the office of the secretary of state as hereinafter provided.

"Sec. 3. That after the first day of January, 1860, all railroad companies or city corporations who have or may hereafter receive the bonds of the State, or its indorsement of their own bonds under the general internal-improvement law of this State, or any

other law, shall be required to pay two and one half per cent per annum as a sinking fund on the amount of the bonds so issued or indorsed by the State for said company or corporation, to be paid in equal instalments on the first days of April and October, five years after the date of said bonds, and annually thereafter.

"Sec. 4. All bonds issued during any one year shall be dated on the first day of January of that year.

"Sec. 5. Said companies or corporations may pay said sinking fund in cash or in the like character of bonds that may have been issued or indorsed by the State for said company at their face or par value.

"Sec. 6. If paid in money, the commissioners shall invest it immediately in the bonds of the State, and shall have the same cancelled and filed as heretofore provided. Such bonds are to be of the same character as those issued to such company or corporation.

"Sec. 7. The sinking fund, when paid, in all cases shall be passed directly to the credit of said company or corporation, and be a release to said company or corporation from that amount due by them to the State. The commissioners shall issue a receipt to each company or corporation for such payment, retaining a duplicate in a well-bound book kept for that purpose.

"Sec. 8. Each and every railroad company or city corporation shall provide the interest semi-annually, as now provided by law, on the amount of bonds unpaid at the time said interest falls due, and not on the original amount issued to or indorsed by the State for said company as heretofore provided.

"Sec. 9. The comptroller of the State shall keep a regular account against each company or corporation, charging them with the amount of bonds originally issued to or indorsed for said company or corporation by the State, and crediting them by the amount of the sinking fund paid, and shall furnish the treasurer of state a statement of the amount due by each company or corporation on the first day of June and December of each year, that he may know how much interest each company or corporation has to pay.

"Sec. 10. The commissioners of the sinking fund shall cancel all bonds of the State, as soon as paid in or purchased, by cutting out the governor's and secretary of state's names, and so defacing each coupon that it cannot by possibility be used or circulated, and shall file the same in the secretary of state's office.

"Sec. 11. This law shall be in full force from and after its passage, and shall repeal all laws in conflict with it, but shall not be so construed as otherwise to affect any law on the subject of the sinking fund or the payment of interest due on State or indorsed bonds."

Under these statutes State bonds were from time to time issued to the several enumerated railroad companies in the following form :

"\$1000.

\$1000.

"No. ———. UNITED STATES OF AMERICA. No. ———.

"Know all men by these presents: That the State of Tennessee acknowledges to owe to ———, or order, one thousand dollars of the lawful money of the United States of America, which the said State promises to pay in the city of New York, on the ——— day of ———, 18—, with interest thereon at the rate of six per cent per annum, according to the tenor, and upon the presentation, of the coupons hereunto attached. For the payments of said sums of money, and the interest thereon, at the times and places and in the manner aforesaid, the faith of the said State of Tennessee is irrevocably pledged, this bond being issued in pursuance and by authority of an act of the general assembly of said State, passed February 11, 1852, to establish a system of internal improvements in said State.

"In testimony whereof, and in pursuance of the acts aforesaid, I, ———, governor of the State of Tennessee, have hereunto subscribed my name officially, and caused the same to be countersigned by the secretary of state, with the great seal of the State affixed.

"[———.] Done at the executive department in the city of Nashville, this ——— day of ———, 18—."

To which was attached the following form of coupon :

"30. THE TREASURER STATE OF TENNESSEE 30.
OF THE

"Will pay the bearer THIRTY DOLLARS, in the city of New York, on the first day of January, 1877, being the semi-annual interest then falling due on bond No. ———.

"J. C. SUTTRELL, 30.
"Comptroller."

Upon the issue of the bonds, receipts were executed by the companies, respectively, in the form required by the statute, in a well-bound book deposited in the office of the secretary of state. The bonds, after their delivery, were sold in the market by the respective companies, in conjunction with the State commissioner, and the proceeds used in the way contemplated by the statute. No complaint is now made of any default on the part of the several companies, whose roads are involved in these suits, prior to the civil war. After the beginning of the war, however, but few payments were made, and various expedients were resorted to, from time to time, for relieving the companies from their embarrassments. In 1866 another act was passed authorizing a further

issue of State bonds, under which some of the bonds embraced in these suits were put out. In this act the provisions as to the lien for the security of the payment of the bonds was substantially the same as in the act of 1852. None of these devices, however, accomplished the purpose the State had in view, and on the twenty-fifth of February, 1869, "An act to liquidate the State debt, contracted in aid of railroad companies in the State of Tennessee," was passed. That act is as follows:

"Whereas, under the general internal-improvement laws of the State, passed from time to time, aid has been granted to various railroad companies by the loaning of six-per-cent bonds of the State, to enable said companies to iron, equip, build, and bridge, and for other purposes, which is now secured to the State by a first mortgage or lien on the franchise, property, and fixtures of respective railroad companies; and

"Whereas, it is desirable for the general welfare of the State that the State shall be reimbursed such amounts as have been advanced to the different railroad companies, as fast as may be practicable; therefore,

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that the respective railroad companies, or either of them, that have created indebtedness to the State, are hereby authorized to repay any amount of the principal of such indebtedness as they have respectively created in the bonds of the State, in such amount and at such times as may be practicable: provided, however, that nothing in this act shall be so construed as to release said railroad companies from any lien which the State may have on the same for any unpaid interest now due on said bonds of the State, authorized to be surrendered by this act.

"Sec. 2. Be it further enacted, that any railroad company or companies repaying any indebtedness due the State under the provision of this act, are authorized to issue bonds of equal amount and denomination with the bonds of the State paid and delivered up for cancellation, as hereinafter provided, which said railroad bonds, so issued in lieu of any amount of State bonds, shall be certified to by the comptroller, entered in a book to be kept for that purpose, with date, number, and amount, and shall be a lien, *pro rata* in amount and of equal validity and effect with the unretired part of the State indebtedness, upon such railroad, and all its property, franchises, fixtures, and material.

"Sec. 3. Be it further enacted, that in order to facilitate the railroad companies that may wish to avail themselves of the provisions of this act, in paying the indebtedness due to the State respectively, they, or any of them, are hereby authorized to consolidate their property, in whole or in part, with other railroad companies, and issue bonds and stock as provided for in the second section of this act, and may adopt the corporate franchise of either

of the roads as the stockholders may elect, and each railroad company paying its indebtedness, and such railroad companies as may consolidate under the provisions of this act, are hereby authorized to determine, by a vote of the stockholders of said company or consolidated companies, the number of directors of such company, and elect the same under the new organization, and that the said directors, so elected, shall, according to the by-laws and rules of said corporation, elect one of their number president of said company.

"Sec. 4. Be it further enacted, that the comptroller of the State shall receive from the railroad companies, or any of them, bonds of the State in such amounts as may be presented, and cancel the same in the presence of the officer or agent of the railroad company paying them in, and execute to the said railroad company or companies duplicate receipts for the amount and number of said bonds so paid in; and it shall further be the duty of the comptroller to certify on the bonds of any railroad company or companies, repaying indebtedness due to the State, that the same has been paid, and that the so certified (bonds) are secured by first mortgage: provided, that said railroad companies shall liquidate their indebtedness prior to the maturity of the bonds that have caused indebtedness: and be it further provided, that said bonds, when said executed by the respective railroad companies, or either of them, shall be deposited with the comptroller of the State, whose duty it shall be to deliver said bonds, or any number of them, to the president and directors of the company, on the deposit by said president and directors, or authorized agent, of an equal amount of the six-per-cent bonds of the State of Tennessee, with unpaid coupons attached, and the company's first-mortgage bonds, authorized to be issued by this act, shall have no validity or value except the comptroller's certificate is affixed on the face of each bond that said bond is executed, and issued, and by virtue of law takes the place of a bond of the State, and is the first-mortgage bond.

"Sec. 5. Be it further enacted, that the comptroller shall be entitled to a fee of one dollar on each thousand dollars of the bonds certified as aforesaid, to be paid by the railroad company for which the same is done; and it shall be lawful for the comptroller to discharge the duties imposed by this act, by and through an agent in the city of New York; and all the provisions of this act shall attach to and become a part of the charter of any railroad company or companies acting under it.

"Sec. 6. Be it further enacted, that by and with the consent of the board of directors of any railroad company in this State under the general improvement law passed the eleventh of February, 1852, and all the amendments thereto, that any person or corporation may, by paying the indebtedness of such railroad company to the State in the bonds of the State, as provided for by the law, be,

and they are hereby, substituted and entitled to all the liens against said company for the payment of said debt that the State had or has by law, and the governor and secretary of state shall give such party or parties paying such indebtedness a certificate showing the facts, which shall be evidence against said company of such indebtedness to said individuals or corporations.

"Sec. 7. Be it further enacted, that any person or persons may, with the consent and approbation of any railroad company which is indebted to, and for which the State of Tennessee holds a lien, pay the said debt, so far as the State is concerned, in the bonds of the State, or any coupons of bonds at par, and the person or persons so paying the debt of any railroad company with the consent of such railroad company shall, upon filing with the treasurer of this State the written assent of said railroad company, under the corporate seal of said railroad company, be entitled to have and hold all the lien or liens which the State of Tennessee had or has upon said railroad or its property, and shall have the same right to enforce the same which the State of Tennessee had; the object and intent being to place the person or persons so paying with the consent of said railroad company in the same position and with the same rights which the State of Tennessee had previous to and before the said payment, and with full power to enforce the same.

"Sec. 8. Be it further enacted, that any person or persons who may, with the consent and approbation of any railroad company, pay any part or portion of the indebtedness of such company as provided in sec. ———, shall have, hold, and be subrogated in all the rights, privileges, and lien or liens of the State, to the extent of, and in proportion to, the amount of such indebtedness, with the same rights and privileges the State now has, to the extent of such payment or payments: provided, the passage of this act shall not decrease the lien of the State upon any railroad of the State until the entire claim of the State is fully liquidated; or affect the interest of the present bondholders of the State: provided, that railroad companies which have issued second-mortgage bonds, availing themselves of the provisions of this act, shall file with the comptroller bonds of the same series as those loaned to such company, for which the State holds a first-mortgage lien: provided, the bonds to be issued by the company, under the provisions of this act, shall not have a longer time to run than the bonds of the State thus released and cancelled.

"Sec. 9. Be it further enacted, that this act shall take effect from and after its passage."

At the next session of the general assembly, January 2, 1870, this act was amended as follows:

"AN ACT FOR THE PAYMENT OF THE STATE DEBT.

"Section 1. Be it enacted by the general assembly of the State of Tennessee, that an act entitled 'An act to liquidate the State debt, contracted in aid of railroad companies in the State of Tennessee,' passed February 25, 1869, be, and the same is hereby, amended so as to allow any railroad company which may be indebted to the State by reason of the bonds of the State loaned to said railroad company, to pay into the State, in liquidation of the principal of said indebtedness, any of the legally issued six-per-cent bonds of the State of Tennessee outstanding, without regard to series or number; and such payment shall, to the extent made, be a full and perfect discharge of the lien which the State holds upon the property of such railroad company, held by virtue of the bonds of the State issued to such railroad company, whether they be the same bonds or the same series of bonds issued to said company under the act passed February 11, 1852, and acts amendatory thereof, or not.

"Sec. 2. Be it further enacted, that railroad companies issuing their own mortgage bonds, under the provisions of the act which this is intended to amend, be allowed to fix the rate of interest which the said bonds of the railroad company are to bear, and all laws in conflict are hereby repealed: provided, that when said railroad companies owe interest already due, coupons past due shall be taken by the comptroller or treasurer in discharge of such indebtedness for interest.

"Sec. 3. Be it further enacted, that when any company, under the provisions of this act, shall pay into the treasury of the State bonds which have been issued by the State to said company, the said bonds shall be cancelled; but should any company, in discharge of its own debts, pay into the treasury any bonds that were issued to other companies that may still be indebted to the State, such bonds so paid in shall not be cancelled, but shall be held by the State as purchased bonds, retaining a lien for the State upon the road to which said bonds were originally issued until the debt of said road to the State shall be fully discharged when the bonds so held shall be cancelled: provided that the provisions of this act shall not be so construed as to allow the payment and satisfaction of debts created by bonds issued by the State, and upon which the State is secondarily liable, nor to the payment of the sinking fund, now required by law, of the railroad companies of this State.

"Sec. 4. Be it further enacted, that this act shall take effect from and after its passage."

Under these statutes the companies whose roads are involved in the present suits against the Memphis & Charleston R. Co., the

Louisville, Nashville & Great Southern R. Co., the Nashville & Decatur R. Co., the Nashville, Chattanooga & St. Louis R. Co., the East Tennessee, Virginia & Georgia R. Co., the Chicago, St. Louis & New Orleans R. Co., the Memphis & Tennessee R. Co., and the Mobile & Ohio R. Co., by the use of substitution bonds or otherwise, obtained from the State a discharge of the liens upon their property under the act of February 11, 1852, and the acts amendatory thereof, so far as the State had the right to execute such a discharge. In doing so, however, they used, to some extent, other State bonds than those which were issued to them originally under the provisions of the act. The bonds so issued and not returned to the State constitute the causes of action on which these suits are brought against the companies above named.

To provide for cases where the companies failed to meet their obligations to the State under the act of 1852, and did not comply with the provisions of the acts of 1869 and 1870, an act of December 21, 1870, was passed, in which, after reciting as follows: "Whereas, in the recent attempt to sell the State's interest in said roads, various legal questions arose, presenting serious obstacles to a sale under the act of 1870, which it is deemed expedient and necessary to obviate before the interest of the State in said roads shall be again offered for sale; and whereas, by the act of 1872, c. 151, § 12, the right is expressly reserved to the State to enact all such laws in the future as shall be deemed necessary to protect the interest of the State, and to secure the State against any loss in consequence of the issuance of bonds under the provisions of said act, in such manner as not to impair the vested rights of stockholders of the companies,"—provision was made for a summary proceeding to foreclose the lien vested in the State, under the act of 1852, and the several amendatory acts, by filing a bill in equity, in the court of chancery at Nashville, against the delinquent companies, to obtain a decree for the sale of the interest of the State in their property. In this act it was provided that the purchase money might "be discharged in any of the outstanding legal bonds of the State;" and that upon the sale of any of the franchises of either of the companies, "all the rights, privileges, and immunities appertaining to the franchises so sold under its act of incorporation and the amendments thereto, and the general improvement law of the State and acts amendatory thereof, shall be transferred to and vest in such purchaser; and the purchaser shall hold said franchise subject to all liens and liabilities in favor of the State, as now provided by law, against the railroad companies."

Under the provisions of this act the liens on the roads involved in the suits against the Memphis, Clarksville & Louisville R. Co., the Nashville & Northwestern R. Co., the McMinnville & Manchester R. Co., the Winchester & Alabama R. Co., the Cincinnati, Cumberland Gap & Charleston R. Co., and the Knoxville & Ken-

tucky R. Co. were all foreclosed, and the property sold under decrees which reserved the lien of the State referred to in the statute "as far as may be necessary to secure the purchase money as aforesaid, and the other rights of the State under the decree in this cause and the said acts of the legislature." Payments of the purchase money were made in bonds of the State of Tennessee without distinction. Bonds of the State, issued to the companies that constructed the foreclosed roads, not taken up at these sales or otherwise by the State, are the causes of action embraced in the suits against the last-named companies, and the defendants in those suits now claim the property under the purchases at the foreclosure sales, free of all liens in favor of the State or its bondholders.

The circuit courts dismissed the bills in all the suits, and these appeals were taken from the several decrees to that effect.

The question which lies at the foundation of all these suits is whether the statutory lien with which the State of Tennessee was invested upon the issue of its bonds to railroad companies under the internal-improvement act of February 11, 1852, and the several acts amendatory thereof, bound the property of the company to which the issue was made for the payment of the bonds so issued, and the interest thereon, to the several holders thereof, or only to the State; for, if to the State alone, it is conceded the lien has been discharged, and is no longer operative. The precise point of the inquiry is for whose benefit the lien was created. Was it the State or the bondholders, or both the State and the bondholders? The lien which was vested in the State was as security for the payment by the company of "all of said bonds issued to the company, as provided in this act, and for the interest accruing on said bonds." This is the language of the provision for the final lien which was to attach, on the completion of the whole road, to "all the property owned by the company, as incident to, or necessary for, its business." Section 4. To whom this payment was to be made is nowhere stated in express terms. In the absence of anything to the contrary, the implication would undoubtedly be that it must be to the holder of the bond, as he was the person to whom the bond, as a bond, was payable; but if, on an examination of the whole statute, in the light of surrounding circumstances, and interpreting it with reference to the subject-matter of the legislation, it appears that the intention was to secure only a payment to the State of the debt incurred by the company on the loan of the bond, there is nothing in the language employed to express the legislative will, which necessarily extends the operation of the statute beyond what is required to give effect to such an intention. It may be that the legislature used the phrase "payment of the bonds and the accruing interest thereon" to express the idea of

"payment to the State for the bonds," and if it did, the statutory lien will stand only as security for such a payment.

The liability of the companies to the bondholders, if any there be, rests alone on the statute, which contemplated loans by the State of its own bonds to the several companies in aid of the public works they were respectively engaged in constructing. The

bonds were to be "coupon bonds of the State of Tennessee." This implies State bonds with coupons

BONDS ON THEIR
FACE THOSE OF
STATE.

for interest attached in the ordinary form then in use, whereby the faith of a State of the United States was pledged for their payment. Such must have been the understanding of all parties at the time, for the bonds actually issued were of that kind, and on their face bound only the State. The law made no provision for naming, either in or upon a bond, the particular company in whose favor it was issued. Neither did the bonds themselves, as issued, contain, by indorsement or otherwise, any obligation whatever on the part of the companies. They were State bonds, pure and simple, "issued in pursuance and by authority of an act of the general assembly of said State, passed February 11, 1852." They were not even made payable to the companies to which they were respectively issued, but went on the market as coupon bonds of the State of Tennessee, payable to the bearer thereof, and apparently nothing else. In this form they were bought and sold by dealers and investors in public securities. So that the point to be determined, from an examination of the statute, is whether a State, when lending its own bonds and taking back security for their payment, intended to protect those who might afterwards become the holders of the bonds against the consequences of its own repudiation or inability to pay, or only to indemnify itself against loss by reason of the loan of its credit to those who were engaged in constructing its great works of internal improvement. To say the least, the strong presumption is that, in such a transaction, the purpose of a State would be to protect itself, and not to secure its own pledge of faith to the bondholders by a mortgage from those to whom its credit was loaned.

Such being the subject-matter of the legislation, we proceed to inquire what the payment was which the State intended to secure by the statutory lien with which it was to be invested. It was to be a payment. This implies a debt from him who pays to him who is to receive, and that when the payment is complete the debt will be discharged. It is not claimed that a borrowing company was to incur two debts by accepting a loan under the statute, —one to the State, and the other to those who might become the purchasers or holders of the borrowed bonds. The obligation was to pay the bonds once, not twice, and the payment was to be made at the time and in the way provided by the law. Who, then, became the creditor of the borrowing company when it incurred its

debt for the borrowed bonds? Was it the State or the bondholders?

Much stress was laid in the argument on the provision in section 3, "that so soon as the bonds of the State shall be issued . . . they shall constitute a lien," etc.; and it was insisted that, as the bond constitutes the lien, and the lien is but an incident of the debt, the lien must continue and follow the bond in the hands of the holder thereof until it is finally paid and taken up by the company. From this it was argued that the bondholder must be the creditor, within the meaning of the statute, and that a payment would not be complete so as to discharge the debt of the company until it was made to him. Similar language was used in a statute of South Carolina, passed December 20, 1856, to aid in the construction of the Charleston & Savannah R., under which the State guaranteed, by indorsement, the bonds of the railroad company, and it was provided "that so soon as any such bonds shall have been indorsed as aforesaid . . . they

HAND v. SAVANNAH
DISTIN-
GUISHED. HERE
STATE PRINCIPAL
OBLIGOR.

shall constitute a lien," etc. This it was held by the supreme court of that State in *Hand v. Savannah & C. R. Co.*, 12 S. C. 314, vested in the State a lien, not merely for its own protection against the guaranty, but also for the better security of the bonds themselves, into whosoever hands they might fall. But, as this court had occasion to say in *Railroad Cos. v. Schutte*, 103 U. S. 140; s. c., 3 Am. & Eng. R. R. Cas. 1, "contracts created by, or entered into under, the authority of statutes, are to be interpreted according to the language used in each particular case to express the obligation assumed. . . . Every statute, like every contract, must be read by itself, and it no more follows that one statutory contract is like another, than that one ordinary contract means what another does. . . . It must be determined from the language, used in each particular case, what has been done, or agreed to be done, in that case." Under the South Carolina statute the primary liability for the payment of the bonds to the respective holders thereof rested on the company, and the State was bound only as surety. This was shown on the face of the bonds themselves, and the language of the statute was, therefore, to be construed with that as the subject-matter of the legislation; that is to say, a guaranty by the State of the obligations of the railroad company. Here the State is the primary obligor, and the legislation is with reference to a loan of State bonds, on which the railroad companies are in no way to appear as bound. The liability of the companies grows out of the borrowing of State bonds, to be sold in the market as State bonds, and apparently nothing but State bonds. The loans were to be by the State to the companies, and the object was to secure the payment of the loans. It may well be that the same language when applied to one class of securities means one thing,

and when applied to another class something else. The question now is, what does it mean in this case?

The fact which establishes the lien is the issue of bonds by the State to a company; that is to say, the delivery of bonds by the State to a company under the contract of loan. The lien attaches

LIEN CREATED
BY DELIVERY OF
BONDS TO COM-
PANY.

as soon as the delivery is complete, and when there is no obligation on the part of the company to the holders for the payment of the bonds, because the company is itself the holder, and there can be no obligation of payment by itself to itself. But the delivery of the bonds by the State to, and their acceptance by, a company, created at once an obligation on the part of the company to pay the loan, or, what is the same thing, pay the bonds to the State. That it was the purpose of the statute to secure the performance of this obligation on the part of the company is shown by the fact that from the moment of the delivery of the first bond to the company, and before the bond could be negotiated by a sale or transfer to a third person, a lien was vested in the State by the very act of delivery upon all the property of the company then acquired, or thereafter to be acquired, superior to any other lien or incumbrance which could be created by the company afterwards. This is the express provision of the last paragraph in section 4; and while it is said once in the entire act that the bonds shall constitute the lien, it is repeated again and again that, upon the issue of the bonds, the State shall be invested with a lien, etc. The only place where it is stated that the bonds shall constitute a lien is that in which provision is made for the issue on the completion of the first section of thirty miles, and, before the sentence in which this expression appears is completed, it is declared that the lien is to vest "upon the issuance of the bonds and by virtue of the same." But when the whole road is completed, and the lien is established on all the property owned by the company as incident to and necessary for its business, the language is: "And when the whole of said road shall be completed the State of Tennessee shall be invested with a lien . . . for the payment of all of said bonds issued to the company as provided in this act, and for the interest accruing on said bonds." This shows unmistakably that the State attached no special importance to the particular phraseology of section 3, with reference to the issue for the first thirty miles of the road. The evident purpose of the whole provision was to vest in the State a lien to secure the obligation which the company assumed in consideration of the State bonds issued to it in aid of works of internal improvement to be constructed for the benefit of the public. If that obligation was to pay the bonds to the several persons who might become the holders thereof, then the security would run with the bond; but if the obligation was to pay the State for the bonds, the security

would inure only to the benefit of the State, and be subject to the control of the State, without regard to the bondholders.

The lien was to be "for the payment of all of said bonds issued to the company, as provided for in this act, and for the interest accruing on said bonds." It was, as has been seen, to begin as soon as the bonds were put into the hands of the company, for it was then and by that act that the liability of the company under the statute was created. At that time no one but the State could be interested in the security, and at that time LIEN OPERATED TO SECURE LOAN OF BONDS. clearly the lien operated only as security for the payment of the loan of the bonds. This could be made by a return of the bonds themselves or in any other way provided in the statute. A return of the bonds to the State would not technically pay the bonds, but it would pay the loan, and thus cancel the obligation of the company to the State and discharge the lien. This brings us to the inquiry whether provision was made in the statute for payment by the company in some other way than by taking up the bonds from the several holders thereof, and if so, to whom and how.

The obligation under the statute is to pay the bonds and the interest accruing thereon. This clearly means payment of the bonds and the interest in the way provided by the statute, if there be any. As the liability of the company to pay at all grows out of the statute, it follows that if a particular mode of payment is provided for in the statute, payment in that mode is all the company can be required to make. Looking then to the statute, we find that provision is made in one part for the payment of interest and the enforcement of that obligation of the company, and in other parts for the payment of principal.

1. As to interest. Section 5 makes it the duty of a company to deposit in the Bank of Tennessee, at least fifteen days before coupons for interest on any of the bonds issued to that company fall due, an amount of money sufficient to pay such interest, including exchange and necessary commissions, or satisfactory evidence that it has been paid or provided for. The Bank of Tennessee was established by the act of January 19, 1838, PROVISIONS FOR PAYMENT OF INTEREST. "in the name and for the benefit of the State," and "the faith and credit of the State" were "pledged" for its support. The State was its only stockholder, and was entitled to all the profits of its business. It was the fiscal agent of the State, and was practically the treasury in which all public moneys were kept. The State treasurer held none of the State funds in his own hands, but deposited them all in the bank, where they were placed to the credit of the "Treasurer of Tennessee," and subject to his checks, drawn according to law, and countersigned by the comptroller. Other accounts connected with the financial business of the State were kept in the books of the bank, headed "Interest on

State bonds," "Interest paid on State bonds," "Railroad companies for interest," and otherwise. The entries made in the books showed the amount which each railroad company paid in for interest, but the payments were all passed to the credit of the State, either in the treasurer's general account, or in the account headed "Interest on State bonds." The bank paid the interest on all State bonds without reference to the purpose for which they were issued. It had correspondents in New York and Philadelphia through whom such payments were made, and these agents took up the coupons when presented and forwarded them to the bank, by which they were handed over to the proper State officers. The moneys paid in by railroad companies for interest were sent with other moneys of the State to the New York and Philadelphia agents, by whom they were paid out upon coupons, no distinction being made as to the different kinds of bonds. The agents kept no accounts with the companies, and neither they nor the bank knew what bonds had been issued to any particular company. No attempts were made, either by the bank or its agents, to classify or identify coupons, when paid, as being coupons from bonds issued to one company or another.

In the books of the treasurer of the State there was an account headed "Bank of Tennessee," the reverse of that kept by the bank in the name of the treasurer. There was also an account headed "Interest on capitol bonds," in which was shown the interest paid on bonds issued for the state-house. Besides this there was an account headed "Interest on internal-improvement bonds," showing the gross amount paid out on such bonds, but not by whom the money was furnished, nor the numbers or character of the bonds on which the interest was paid. No separate accounts were kept in the treasurer's books with the different railroad companies, and, with the exception of the distinction between capitol and internal-improvement bonds on his books, the treasurer paid no attention to the different kinds of bonds, but treated all as equally the obligations of the State. This was the way in which the business was done by all the companies, the bank, and the treasurer of the State, as long as the bank was in operation.

Under these circumstances, it is difficult to see how a deposit in the bank by a company of the money to pay interest can be treated otherwise than as, within the meaning of the statute, the payment by the company of the accruing interest on the bonds, which the company had bound itself to make. The deposit was made to enable the State to meet its own obligations. It was not placed, neither by the statute was it required to be placed, to the credit of the company, but of the State. The bank did not take the money for the company, but for the State, and consequently the deposit was accepted and kept as and for State funds. Neither the bank nor the State was

FUNDS PAID INTO
BANK BY COM-
PANY PASSED TO
CREDIT OF STATE

bound, either to the companies or to the bondholders, to use the deposits made by a particular company to pay the interest on bonds issued to that company. The bank is nowhere made by law the agent of the company. It was to take, keep, and pay out according to law, for the State, all moneys deposited or set apart for the liquidation of accruing interest. If the deposits made by the various companies were not enough for that purpose, it was the duty of the comptroller to draw from the treasury, on his own official warrant, a sufficient amount to make up the deficiency. No special provision was made in the statute as to the way in which coupon-holders were to be paid. That was all left to be determined by such regulations as might from time to time be adopted for the government of State officers and State agencies in the payment of State debts. The money, when deposited, became at once the money of the State, and was in no way thereafter subject to the control of the depositor. When used to pay maturing interest, it was paid by, and on behalf of, the State, through its own agencies, to redeem its own pledges of faith to the holders of its own obligations. The company performed its whole duty to the State when it deposited in bank, subject to the control of the State, a sufficient amount of money to meet the interest which was to accrue on the State obligations fifteen days thereafter, and the expenses incident to such payment. It is true, an option was given the company to pay the interest instead of making the deposit; but this was clearly intended for the convenience of the company, and not because of any obligation the company was supposed to be under to the bondholders. Payment, therefore, by a company, into the bank, of a sufficient amount of money to enable the State to meet its accruing interest, was, and was intended by the legislature to be, not only a payment of the interest on the bonds by the company, but the payment, and the only payment, of interest the lien created by the statute was to secure. To hold otherwise would be to decide that the legislature, while providing for a loan of the bonds of the State to corporations engaged in works of internal improvement, required the corporations to secure by liens on their own property, not only the payment to the State of the interest on the loan, but also the redemption by the State of its own pledges of faith to the future holders of the State bonds that were lent. Certainly no such construction will be given to the statute unless it is imperatively demanded; and when provision is made in express terms for a payment to the State, no second payment of the same debt will be presumed to have been in the contemplation of the parties, in the absence of some positive requirement to the contrary. The lien must be held to be for the security of the payment which is expressly provided for, and no other.

But the correctness of this view of the statute is made still more apparent by another important provision of the same section 5,

to the effect that if a company failed to deposit the interest at the time required, or furnish the necessary evidence that payment of the interest had been made or otherwise provided for, the governor should appoint a receiver to take possession, and run and manage the railroad of the company until a sufficient sum was realized from the earnings to discharge such "unpaid interest." The failure of a company to make its deposit did not relieve the State from the obligation to keep its faith and pay the interest to its bondholders at maturity. Consequently, the "unpaid interest" here referred to must have been the interest for which a deposit had not been made, and this clearly implies that the deposit was the payment which the lien was intended to secure. Interest on the lent bonds deposited for was paid, within the meaning of the statute, and that not deposited for was unpaid. A receiver was to be appointed, and possession taken, only when there was default on the part of the company in making its deposit. Non-payment of interest by the State, after the deposit, created no such default. As the statutory remedy for the enforcement of the statutory lien must be presumed to have been intended to be commensurate with the lien itself, and this remedy was confined to cases of default in making deposits, there cannot be a doubt that it was the understanding of the legislature that a deposit for interest was a payment of interest on the bonds so far as the company was concerned, and released the company as well as its property from all further liability to the State, or to any one else, which had been assumed for interest. The pledge of State faith for the performance of all State obligations under the act constituted the only security of the bondholders for the prompt payment of the interest due to them. The liens on the property of the companies stood only as security for the payment of the interest on the bonds to the State.

2. As to the principal. This is provided for in three ways: (1) by the establishment of a sinking fund; (2) by foreclosure if the company failed to pay the bonds at maturity; and (3) by foreclosure and proceedings against guilty stockholders, before maturity, if an issue of bonds was obtained by fraud, or contrary to the provision of the act. The sinking fund was first established by section 7 of the original act, which required each company, at the end of five years after the completion of its road, to set apart annually 1 per centum of the amount of bonds issued to such company, and use it in the purchase of bonds of the State of Tennessee, which bonds the company was to pay into the treasury of the State, taking a receipt therefor, and, as between the State and the company, the bonds so paid in were to be a credit on the bonds issued. The bonds paid in, and the accruing interest thereon, were to be held and used by the State as a sinking fund

FAILURE TO DE-
POSIT INTEREST
—APPOINTMENT
OF RECEIVER.

for the payment of the bonds issued to the company. If in this way a company repurchased and paid in any of the ^{PAYMENT OF} bonds issued to it, they were to be cancelled. Should ^{PRINCIPAL—} a company fail to comply with these provisions, it was to be proceeded against as in section 5, for a failure to pay, or deposit for interest. This provision was changed by the act of 1856 so as to increase the annual payments to 2 per cent on the amount of the issue of bonds, and to require them to be made in money, and to begin at the end of five years after the dates of the several issues. The money, when paid into the treasury, was to be invested by a board of sinking-fund commissioners in bonds of the State, and all accruing interest was to be reinvested in like securities. If a company failed to comply with these provisions of the amending act, it was to be proceeded against as for a default in the payment of the bonds at maturity under section 6 of the act of 1852. Under the statutes of 1852 and 1856 the companies were not released from their obligations to provide semi-annually for the payment of the accruing interest on the entire issue of bonds. That was still to be kept up, notwithstanding the debt of the company to the State had been reduced by the annual payments required by section 7.

By the act of 1860 other changes were made, which increased the amount of annual payments to $2\frac{1}{2}$ per cent on the original issues, and allowed them to be made in money, or in bonds of a like character with those issued to the company, at their face value. If paid in money, the sinking-fund commissioners were to invest it immediately in bonds of a like character with those issued to the company, and have them cancelled. By this act also the company was released from the obligation under the act of 1852 to provide for the interest on the whole issue of bonds and required to deposit only for that which would accrue on the amount of bonds "unpaid" at the time the interest fell due. What was here meant by the word "unpaid" is shown by sections 1, 2, and 9 of the act, which provide that all sinking-fund payments, in money or bonds, made before January 1, 1860, with the accruing interest thereon to that date, "shall be passed directly to the credit of the party having so paid the same, and be a release to said party for that amount of the debt due by them to the State of Tennessee." The comptroller of the State was also required to open and keep a regular account with each company, charging it with the total amount of bonds originally issued to such company, and crediting it with the amount of the sinking fund paid. It was also made his duty to furnish to the treasurer of state a statement of the amount due by each company on the first days of June and December in every year, "that he may know how much interest each company has to pay," that is, deposit, "as now provided by law, on the amount of bonds unpaid at the

time said interest falls due, and not on the original amount issued to . . . said company." Act 1860, §§ 8, 9.

While it is true that neither the act of 1846 nor that of 1860 can change any contracts the companies may have made with bondholders under the act of 1852 before their passage, they may be resorted to in aid of construction to show what had been the legislative understanding, for a long series of years, of the meaning of the words "payment of said bonds and the accruing interest thereon," as used in the original act. The provision of section 7 is that the company shall pay the bonds purchased into the State treasury, and that for the purchased bonds so paid in a receipt shall be given and a credit allowed, as between the State and the company on the bonds issued. Thus the company was required to make a payment to the State, and for this payment the State was to give a credit on the bonds. This clearly implies that the loan of the bonds was to create a debt on the bonds by the company to the State, and that this debt was to be discharged *pro tanto* on the payment annually into the State treasury of the amount required by the sinking-fund section. If there were nothing else in the statute, no one would doubt that the payment of the bonds which the company was required to make was a payment to the State for the bonds at the times and in the manner provided.

It is contended, however, that, as the credit to be secured by these payments was only "as between the State and said company," the liability of the company to the bondholders is not affected by what may be done by and with the State. This would be true if there were any such liability to the bondholders, but the very point to which our inquiries are now directed is as to whether or not that liability exists. The phrase relied on and quoted above is undoubtedly suggestive of some other liability of the company on the bonds than one to the State, but it does not of itself create such a liability. If it exists at all, it must be by virtue of some other provision of the statute. As has already been seen, there is but one debt, and whatever pays that debt cancels all the obligations of the company upon the bonds. Whenever, therefore, it appears that payment of the bonds must be made to one, the idea of a debt on the bonds to another is excluded. Here a payment to the State is absolutely required. This obligation to pay is express, and has not been left to implication. The provision is that the sinking-fund bonds must be bought and paid in at the appointed times, and to the prescribed amount. If this is not done, the payment is to be enforced by putting the railroad of the company into the hands of a receiver, and running and managing it until the requisite amount of money is realized by the State from the earnings. Under the act of 1856 the payments were required to be made in money, and,

ACTS OF 1856
AND 1860 AID IN
INTERPRETING
ACT OF 1852.

PAYMENT INTO
SINKING FUND
RELEASED COM-
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in case of default, proceedings for foreclosure and sale were to be instituted to collect the amount to be paid, as in cases of non-payment of bonds at maturity. If the statutes of 1852 and 1856 stood alone, it would be clear to our minds that payments into the sinking fund were to be treated as a release *pro tanto* of all the liability of the company on, or on account of, the bonds. But the act of 1860 shows, beyond all question, that such was the legislative understanding at that time of the operation of this provision of the original act. It is there declared in positive language that by the loan of the bonds a debt was incurred by the company to the State, and that payments to the sinking fund should release and discharge the companies *pro tanto* from their liability on that debt.

It is argued, however, that as these payments under all the statutes were to be held and used by the state as a sinking fund for the ultimate redemption of the issued bonds themselves, from the several holders thereof, the obligation of the company to pay the bonds would not be discharged in that way; and some remarks of this court in Sinking Fund Cases, 99 U. S. 725, are cited as authority to that effect. The decision in that case was that the contributions to the sinking fund, then under consideration, did not pay the debts of the several companies by which the contributions were made, because that fund was established, not to secure the payment of the bonds of the United States which had been lent to the companies, but the repayment to the United States, in the manner and at the time required by law, of "the amount of said bonds so issued and delivered to said company, together with the interest thereon which shall have been paid by the United States." But here the sinking fund is to be held and used by the State, not to discharge the debt of the company to the State, but that of the State to its bondholders. It was established, not to secure the State, but to enable the State to pay its own debts at maturity. In this way all payments made by the companies to the State on account of the principal of the bonds were set apart and laid by under investment, so that at the appointed time they might be used by the State to redeem its own obligations. The fund in the treasury belonged to the State, and was not in any manner subject to the control of the company, or to be used to pay its debt. That debt was discharged by the payments which, under the law, were put into the fund. All payments out of the sinking fund were to be made by the State on its own debts, and not on the debt of the company. A sinking fund may be, and generally is, intended as a cumulative security for the payment of the debt with which it is connected. In this case the debt to which it belongs is that of the State, and not that of the company, which was paid so as to furnish the State with the means to create such a fund.

SINKING FUND
ESTABLISHED TO
ENABLE STATE
TO PAY ITS OB-
LIGATIONS.

Reference was made in the argument to the way in which, under

the act of 1852, and perhaps that of 1856, the sinking fund was to be kept and invested, and it was urged that the fund must have been intended as security for the payment of the bonds to the bondholders by the company, because if a bond issued to a particular company was bought by that company and paid into the fund, it was cancelled, while all other bonds were kept alive to be held and used by the State to take up at maturity the bonds issued to the company, which had not been so paid in. The argument seems to be, that, as the purchase of a bond issued to a particular company, and its payment into the fund by that company, would of itself be a payment of that bond by the company, both to the State and the holder, the special provision for the cancellation of such a bond, while others are to be kept alive, is indicative of a purpose not to cancel the obligation of the company under the statute until the company had not only provided the State with the means to take up all the other outstanding bonds, but until the State had itself performed its own obligations and actually taken them up. This is undoubtedly a circumstance to be considered in determining what the payment was which the State intended the company should make, and for the security of which the lien was created; but it is not to our minds enough to overcome the many provisions found in the other parts of the statute, which so clearly show that there was to be but one creditor of the company on account of the contemplated loans of the bonds, and that creditor the State. Whatever, therefore, satisfies that creditor, under the law, satisfies the debt. We cannot accede to the proposition, so much relied on by the counsel for the bondholders, that on putting out the bonds the company occupied towards the bondholder the relation of principal debtor, and the State that of surety only, until the company made the prescribed payments to the State, and that after these payments were made the relations of the parties changed, so that thereafter the State was principal and the company a surety only. The debt of the company, whatever it was, continued the same in its relation to all the parties from the time it was created until it was paid. There is nothing in the statute which contemplates any change in the obligations of the parties towards each other. There may have been no good reason for keeping some of the State securities paid into the fund alive, and directing that others should be cancelled, inasmuch as all were to represent State debts, for which the State was equally bound; but that was the will of the legislature, and it was consequently so enacted. Afterwards this policy was changed, and all State bonds, of whatever character, were canceled by mutilation as soon as they were paid in, or bought for the sinking fund. Act 1860. In this way all danger of a misappropriation of securities in the sinking fund was avoided. As bonds issued to railroad companies under the act could alone

PROVISION FOR
CANCELLING RE-
TURNED BONDS.
STATE PRINCIPAL
AND ONLY OBLI-
GATOR ON BONDS.

be used for the investment of the fund under this act, their cancellation did not affect the liability of the several companies thereon to the State, because that was to continue until payment was made to the State by the company to which it was issued. Payment by the State to the bondholder did not discharge the liability of the company on the bond so paid.

The provision for a foreclosure in case of the failure of the company to pay at maturity the bonds issued to it is found in section 6, which makes it the duty of the governor, when such a default occurs, to notify the attorney-general, who must thereupon file a bill against the company in the name of the State of Tennessee in the chancery or circuit court of the proper county. Upon the filing of this bill, the court is authorized to make such judicial orders, including the appointment of a receiver, and a sale of the road and all the property of the company, as may be necessary and proper to secure the payment of the bonds, with the interest thereon, and to indemnify the State against loss by their issue. We see no special significance, so far as the present question is concerned, in the direction to the attorney-general to file the bill in the name of the State. Without such a direction

FORECLOSURE TO
PAY PRINCIPAL
DEBT. NOTHING
SPECIFIED AS TO
PAYMENT OF
BONDS.

there might be doubt whether the suit to be instituted should be in the name of the attorney-general or of the State. It was probably unimportant whether the one form or the other was adopted, for, in any event, the object would be to enforce the obligation of the company and collect the money which was due. The legislature, however, saw fit to avoid all doubt on this subject, and to direct that the proceeding should be in the name of the State. Taken by itself, therefore, this section adds little, if anything, to the other evidence in the statute, as to who the creditor was for whose benefit the money was to be collected. The proceeds of the foreclosure were to be used to pay the bonds, within the meaning of the statute, and also to indemnify the State against loss. To whom the payment was to be made must be determined by looking elsewhere. There is nothing to show that the author of the statute had the security of the bondholder in his mind when drafting this section, any more than when drafting the others. Payment of the bonds meant in this section what it did in the others; no more, no less. It is true that here payment of the bonds and indemnity to the State are both spoken of, but payment of the bonds through a proceeding for foreclosure might not be enough to indemnify the State against all loss incident to the loan of the bonds. There might be expenses incurred in the foreclosure which would not be reimbursed by a simple payment of the amount of the bonds. Indemnity of this and a like character was evidently the purpose of this particular provision in the section. It was in the language of counsel for the bondholders, to secure the State

against "a money loss . . . in the way of counsel charges, or receiver's charges, or betterment expenses, or debts not included in the words 'to secure the payment of said bonds.'"

Proceedings for foreclosure before the maturity of the bonds, and the liability of guilty stockholders in case of issues of bonds obtained by fraud, or contrary to the provisions of the act, are provided for in section 13. This section makes it the duty of the governor, as soon as he receives reliable information of such fraud or irregularity, to notify the attorney-general, who must at once institute a suit in the circuit or chancery court of the proper county.

FORECLOSURE IN
CASE OF FRAU-
DULENT ISSUE
"PAYMENT OF
BONDS" BY COM-
PANY CON-
STRUCTED AND EX-
PLAINED. In such a suit the court is given authority to order a sale of the road, and the property and assets of the company, or so much thereof as may be necessary. When such a sale is made, the proceeds are to be paid into the treasury and invested by the comptroller in "the same stocks, creating a sinking fund, as provided for in the seventh section." The guilty company is also made to forfeit all its rights and privileges under the act, and its guilty stockholders are made individually liable "for the payment of the bonds so fraudulently obtained by such company, and for all other losses that may fall upon the State in consequence of the commission of any other fraud by such company." This is manifestly for the benefit of the State alone. The bondholder can have no special interest in such a proceeding. His rights are in no way affected by the fraud of the company in obtaining the bond he owns. The State is his debtor, and he has no right to call for the money owing to him until the maturity of his bond, which will not be until 30 or maybe 40 years after the commission of the fraud which gave the State the right to call at once on the company and its implicated stockholders for the payment of the bond he holds. It will hardly be contended that it was intended to make the stockholder individually liable to the bondholder, yet his liability is for "the payment of the bonds" just as is that of the company. If in his case payment of the bonds does not mean payment to the bondholder, it does not in that of the company. The language of the act is the same in both cases, and there is nothing whatever to show that as to one it meant one thing, and as to the other something else. The evident purpose of this section was to give the State the power, immediately on the discovery of a fraud, to demand of the company "payment of the bonds,"—that is, payment of an amount of money equal to that called for by the bonds,—and a remedy at once against the company and its implicated stockholders for the enforcement of such a payment in case it was not voluntarily made. The money when collected was to be set apart and invested "as a sinking fund for the payment of the bonds" by the State.

By section 14 it was made the duty of the governor to appoint an agent for the State, to attend all sales, made either under section

6 or section 13, to protect the interest of the State, and, if necessary for that purpose, to buy the road or property in the name of the State. If bought, it was to be put in the hands of a receiver to manage and run in the way provided in section 5, until the next meeting of the general assembly. The receiver was to settle his accounts with the comptroller semi-annually, but no directions were given in relation to the manner in which the net earnings were to be used in case of a sale under section 6. He was to take possession of "the said road and property and use the same as provided for in the fifth section," and, on the settlement of his accounts with the comptroller, the balances remaining in his hands would necessarily go into the treasury, there to be dealt with as the general assembly should direct. If a purchase was made by the State under section 13, the presumption would be that the earnings must go into the sinking fund, as such was the provision made for the proceeds of a sale to another purchaser; but all that would necessarily be under the control of the general assembly when it met.

Having thus gone over the other sections, we are prepared to consider section 12, in its bearing on the question which is now under discussion. This section reserves to the State in express terms the right to enact "all such laws as may be deemed necessary to protect the interest of the State, and to secure the State against all loss in consequence of the issuance of bonds under the provisions of this act, but in such manner as not to impair the vested rights of the stockholders of the companies." This reservation includes, and was undoubtedly intended to include, full power in the State, as against every one except stockholders, to do whatever might be deemed necessary by the legislature, with the lien reserved for the security of the obligations assumed by the companies. Nothing is said about bondholders. It will, of course, be conceded that if bondholders actually had any vested right or interest as against the State in the security created by the statute, nothing could be done under this section by the State to impair that right. But the same was probably true of stockholders, and the special care taken to preserve the rights of stockholders, without referring to bondholders at all, raises a strong presumption that it was never intended to vest in them any right which would interfere in the remotest degree with the free exercise of all the power of the State to deal with the borrowing companies in reference to the bonds and the security created therefor, just as might, under any circumstances that should arise, be deemed most for the interest of the State and the companies, they being the only parties to the contract of the companies that were to be at all interested in what was to be done. As has been seen, the bonds to be issued were on their face to bind only the State. At that time repudiation of State faith was not thought of. No purchaser of State bonds ever asked whether anything else than

SECTION 12—
CLAUSE SAVING
VESTED RIGHTS
OF STOCKHOLD-
ERS CONSTRUED.

the faith of a State was pledged for their payment promptly at maturity. Repudiation was looked upon as dishonorable, and something that would never occur. Security to the State against loss by the loans of its bonds which were provided for must, therefore, be presumed to have been the sole purpose of the liens which were to be created on the issue of the bonds. Bondholders were never thought of in this connection, for they had the security of the faith of the State, and could not have been supposed to look for anything else. Hence, this reservation of power by the State was made broad enough to allow the State to deal with the securities which were taken from the companies at its own discretion, and in any way that might be deemed just. No such power could be exercised if the bondholders held an interest in the securities adverse to the State. Under these circumstances this section is to be looked upon as excluding any such possible intent, and operating as a standing notice to all who might, from time to time, become the holders of any of the lent bonds that the payment of the bonds, and the interest thereon, which the several companies bound themselves for, was to be made to the State, and not to them, and that the security which was taken by the State was for the performance of this obligation, and might be dealt with by the State in any manner its own legislature should direct or provide. This reservation of power is entirely inconsistent with the idea of a debt from the company to the bondholders on account of the bonds; and, if there could have been any doubt on this subject without section 12, there certainly is none with it.

This disposes of all the cases; for the State, in the exercise of its legislative discretion, has released each of the companies whose property is involved in these suits from all its obligations growing out of the original loans, and has cancelled the liens created for their security. The companies have either voluntarily paid their debts to the satisfaction of the State, or the State has foreclosed the lien which was reserved, and sold the property free of that incumbrance, either to the present defendants or to those under whom they claim.

Some reliance was placed in the argument for the bondholders, upon the legislative history of the passage of the act of 1852, which showed an offer and rejection of certain proposed amendments, and also upon the construction which had been put on the act by certain State officers of high authority in the administration of the public affairs; but we have deemed it unnecessary to add to the length of this opinion by particular reference to that branch of the argument, because, as we think, the statute contains within itself unmistakable evidence of its meaning. The same is true of the reference which has been made to other statutes of Tennessee, and to statutes of the States and of the United States upon the same general subject. This statute differs in its phraseology from some,

and perhaps all, of the others, but its own language furnishes all the aid which is required for its true interpretation. The decree in each of the cases is affirmed.

MATTHEWS and BLATCHFORD, JJ., took no part in these decisions.

State Aid to Railroad Companies—Power of State to grant Aid.—In some States the constitution prohibits the State from becoming a party to any public improvement. In these States it cannot grant aid to railroads. *Sloan et al. v. State*, 51 Wis. 623.

In some States a like prohibition is implied from a clause in the constitution to the effect that the State shall not be interested in any private enterprise. *Galloway v. Chatham R. Co.*, 68 N. C. 147; *University R. Co. v. Holden*, 68 N. C. 410.

In some States the State cannot loan its credit without the consent of the people at an election held for the purpose. *State of Arkansas v. Little R., M. R. & Tex. R. Co.*, 31 Ark. 701.

In some cases the issue of State bonds in aid of railroads has not been allowed upon the ground that it would increase the debt of the State beyond what the constitution allowed. *Williams v. Louisiana*, 103 U. S. 637; s. c., 3 Am. & Eng. R. R. Cas. 128; and see *Durkee v. Board of Liquidation*, 103 U. S. 636; s. c., 3 Am. & Eng. R. R. Cas. 135.

Where the power of the legislature to aid in the construction of public works is limited by the constitution, an act of the legislature granting State aid to a line of railway differing materially from that to which the constitution authorizes the giving of such aid is unconstitutional. *Holland v. Florida*, 14 Fla. 455.

In some cases where a loan is made by a State to a railroad company the legislature is vested with the right to demand additional security beyond that originally demanded, at whatever time it may see fit to do so. *Hemlingway v. Vicksburg & N. R. Co.*, 52 Miss. 16.

Constitutional Questions.—When State bonds have once been issued in aid of a railroad company in pursuance of law, a subsequent act prohibiting the levy of taxes to meet principal or interest without a vote of the people is unconstitutional as impairing the obligation of a contract. *State of Minnesota ex rel. v. Young et al.*, 2 Am. & Eng. R. R. Cas. 348.

Where a company has a vested right to State aid, this cannot be taken from it by subsequent legislation. *Northeastern R. Co. v. Morris*, 59 Ga. 364.

When a State having guaranteed the bonds of a railroad company becomes liable thereon, it cannot issue certificates of indebtedness payable to bearer in satisfaction thereof. This is an issue of "bills of credit" within the prohibition of the constitution of the United States. *State ex rel. v. Comptroller Gen'l*, 4 S. C. 185.

Incidents of Issue of State Aid Bonds.—When the governor of the State is authorized by law to endorse railroad bonds only as and when certain portions of the road are completed, such endorsements are binding on the State when the bonds have passed into the hands of *bona-fide* purchasers for value, even though the endorsements were procured by false representations as to the state of the road's completion, and were in excess of the amount which the company was entitled by law to receive. *State ex rel. v. Cobb*, 64 Ala., 127; s. c., 7 Am. & Eng. R. R. Cas. 147.

When State bonds issued in aid of a railroad company are sold abroad through the active efforts of the governor of the State, the court will treat the owners as purchasers for value and in good faith and will enforce the bonds in their hands, although said bonds were actually fraudulent in their inception. *Railroad Cos. v. Schutte*, 3 Am. & Eng. R. R. Cas. 1.

When by law a railroad corporation is entitled to State bonds only upon

depositing with the State a like amount of its own bonds, payable forty years after execution, it cannot demand the State bonds upon tender of its own bonds, payment of all of which is exigible upon six months default in payment of interest. *State ex rel. v. Nicholls et al.*, 30 La. Ann. 1217.

When a railroad company has complied with all the terms entitling it to bonds voted to it by the State, it may have a peremptory *mandamus* to compel the State Treasurer to issue the bonds. *Northw. N. C. R. Co. v. Jenkins*, 65 N. C. 173.

Where the legislature of a State has rightfully voted a loan to a railroad company, *mandamus* will lie to compel the governor to draw a warrant for the sum thus appropriated. *Tenn. & Coosa R. Co. v. Moore*, 36 Ala. N. S. 871.

Payment of Loan and Surrender of Indemnity.—When a State loan is made reimbursable at the pleasure of the State after twenty years, no time for payment is fixed until the legislature takes action in the premises. *People ex rel. v. Denniston*, 23 N. Y. 247.

When a State has authorized a railroad company to issue a certain number of bonds and has agreed to endorse part of said issue in consideration of the receipt of another portion as indemnity against such endorsement, a holder of endorsed bonds cannot object to the passage of a subsequent act authorizing the surrender of the indemnity bonds to the company. He is in no way injured thereby. *First National Bank of Charlotte v. Jenkins*, 64 N. C. 719; and see *McAden v. Jenkins*, 64 N. C. 796; *Raleigh & A. A. L. R. Co. v. Jenkins*, 68 N. C. 499.

Sale of Stock or Indemnity Bonds.—When a corporation has subscribed to and taken stock in a railroad corporation, it may lawfully sell the same without thereby dissolving the corporation. *Grange & M. R. Co. v. Ramey*, 7 Coldw. (Tenn.) 420.

Where a State exchanges its own bonds for the first-mortgage bonds of a railroad company it may lawfully dispose of the latter in payment of its subscription to another railroad company. *Wilmington, C. & R. Co. v. Western R. Co.*, 66 N. C. 90.

Mortgages held by State as Indemnity.—When railroad bonds are endorsed or guaranteed by the State and in return a like number of the company's bonds are deposited with the State, which are secured by a mortgage on the company's property, the State may enforce the bonds thus held by her as *pari passu* in lien with the rest of the issue. *Gibbes v. Greenville & C. R. Co.*, 13 S. C. 228; s. c. 4 Am. & Eng. R. R. Cas. 459. But they have no superior lien. *Minnesota Pacific R. Co. v. Sibley*, 2 Minn. 13.

When a loan is made by the State and a mortgage taken to secure it in pursuance of a public statute, all persons are charged with notice of it, and the State will not be prejudiced by the neglect of her agents to have the mortgage recorded. *Memphis & L. R. Co. v. State*, 37 Ark. 682; s. c. 13 Am. & Eng. R. R. Cas. 323.

Extent of Statutory State Lien.—It is common for a State loaning money to a railroad, issuing State bonds in aid of it or endorsing the railroad company's bonds, to reserve a statutory lien or mortgage upon the road by way of indemnity to itself. Much question has arisen as to the extent of this lien.

Where a statute authorized the endorsement by the governor of a State of railroad bonds as different portions of the road were finished, the lien reserved to the State to indemnify it on account of such endorsements was held not to be limited to the portion of the road built when the endorsement was made, but to extend and apply to the entire road as finished, to the exclusion of and in priority to any other lien. *Colt v. Barnea*, 64 Ala. 108; s. c., 7 Am. & Eng. R. R. Cas. 129.

Lands bought by the railroad after the inception of the lien held for and

used by the road are subject thereto, whether the title to them stands in the name of the company or the name of individuals. But lands outside the layout of the road are not subject to the lien. *Boston & N. Y. Air Line R. Co. v. Coffin et al.*, 12 Am. & Eng. R. R. Cas. 375. In some cases, however, the lien has been held to extend to lands purchased by the railroad company after the creation of the lien, although not necessary for the operation of the road. *Whitehead v. Vineyard*, 50 Mo. 80.

The lien of the State in such case will extend not only to property belonging to the road at the time of its completion, but also to all after-acquired property. Such lien does not, however, extend to money earned in working the road. *McGraw v. Memphis & Ohio R. Co.*, 5 Coldw. (Tenn.) 484; nor does it extend to money paid in for stock while the road is in course of construction. *Hoard v. Casey*, 4 Sneed (Tenn.), 178.

Relative Priority of Statutory State Liens.—The State lien for State subscriptions is prior to the lien of any township for its subscription. *State ex rel. v. Nashville & C. R. Co.*, 7 Lea. (Tenn.), 15.

But the State may waive its lien in favor of a township. *Ketchum v. Pacific R. Co.*, 4 Dill. 78, and the State may waive its lien in favor of a subsequent mortgage. *Brown v. State of Maryland et al.*, 62 Md. 489; s. c.; *supra*.

When the State agrees to take as her security a portion of the first-mortgage bonds, such bonds when handed over to the State have no exclusive or prior lien over the bonds comprising the rest of the issue. *Minnesota & Pacific R. Co. v. Sibley*, 2 Minn. 18.

They come in *pari passu* with the rest of the issue. *Gibbes v. Greenville & C. R. Co.*, 18 S. C. 228; s. c., 4 Am. & Eng. R. R. Cas. 459.

When a railroad company having purchased its road from another company by deed containing several conditions subsequent, mortgages said road to the State as indemnity for the State's endorsements upon its bonds, the lien of the State under the mortgage is not paramount, but subject to the condition in the deed of the seller company. If there is breach of said condition the lien is inefficacious against the seller company. *Tenn. & C. R. Co. v. East Alabama R. Co.*, 73 Ala. 426; s. c., *supra*.

Inurement of Statutory Lien to Benefit of Bondholders.—The question has many times arisen which is discussed in the case of *Stevens v. Railroad Cos.*, *supra*, as to whether the statutory lien is for the benefit of the State alone or whether it can be deemed to inure in any case to the benefit of the bondholders.

The principle seems to be well settled that where bonds are issued by the State in aid of a railroad, no railroad bonds being taken in exchange therefor, but a statutory lien reserved upon the property of the company, this lien is for the protection of the State alone and cannot be taken advantage of by the bondholders. *Stevens v. Louisville & N. R. Co.*, 3 Fed. Rep. 678; *Stevens v. Railroad Cos.*, 114 U. S. 664; s. c., *supra*.

When State bonds are issued to a railroad company without due authority and are by the company sold to various purchasers, said bonds constitute no lien in the hands of such purchasers against the property of the company. The holders are restricted to their statutory right of action against the company. *Tompkins v. Little Rock & Ft. S. R. Co.*, 18 Fed. Rep. 844.

When the State endorses or guarantees the railroad company's bonds and reserves a statutory lien or mortgage for its own indemnity, a different rule applies. The bondholders are in such case entitled to be subrogated to the State's lien and to enforce the same for their own advantage. *Gibbes v. Greenville & C. R. Co.*, 18 S. C. 228; s. c., 4 Am. & Eng. R. R. Cas. 459; *Hand v. Savannah & C. R. Co. et al.*, 12 S. C. 814; *Same v. Same*, 17 S. C. 219; *Young v. Montgomery & E. R. Co.*, 2 Woods, 606; *Forrest's Executors v. Luddington*, 68 Ala. 1; s. c., 12 Am. & Eng. R. R. Cas. 80. The question is one for a court of chancery. *Ex parte Brown*, 58 Ala. 536.

In such case one bondholder cannot obtain any priority over another. *Hand v. Savannah & C. R. Co. et al.*, 12 S. C. 314; *Same v. Same*, 17 S. C. 219. The State need not be made a party to the enforcement of the lien. *Young v. Montgomery & E. R. Co.*, 2 Woods, 606. At least when the State has refused to do so, and disclaimed liability upon her endorsement. *Forrest's Ex'rs. v. Luddington*, 68 Ala. 1; s. c., 12 Am. & Eng. R. R. Cas. 830.

Some authorities are to the effect that the holder of railroad bonds endorsed by a State cannot avail himself of the statutory lien reserved by the State. This, it is said, was intended for the protection and indemnification of the State only, and did not in any way make the State a trustee for bondholders. *Cunningham v. Macon & B. R. Co.*, 8 Woods, 418. But the weight of authority is, as has been shown, to the contrary.

When the State exchanges its bonds for those of the railroad company, reserving a statutory lien, it seems that the holders of the State bonds may enforce the lien for their own benefit. *State of Florida v. Jacksonville, P. & M. R. Co.*, 16 Fla. 708.

When a State issues bonds in aid of a railroad company, receiving in return an equal amount of the company's bonds, and reserving a statutory lien duly registered, it does not follow that because the act authorizing the issue and exchange of the State bonds was unconstitutional the lien is of no effect. Such bonds reciting on their face that the State held "the first-mortgage bonds of the railroad company for a like amount as security to the holder thereof, the company is to be regarded as the guarantor of such bonds, and the statutory lien may accordingly be enforced for the benefit of such holders, in spite of the unconstitutionality of the original transaction." *Railroad Co. v. Schutte*, 8 Am. & Eng. R. R. Cas. 1.

Waiver, Release, and Redemption of Lien.—When a State holding a lien upon a railroad authorizes the issue of subsequent mortgages without reserving the lien, it will be deemed to have waived the same. *Newport & Cinn. B. Co. v. Douglass*, 12 Bush (Ky.), 78.

When by the constitution the release of the State's lien is forbidden, an act to foreclose the lien may nevertheless stipulate that in certain contingencies no sale shall take place. *Woodson v. Murdock*, 22 Wall. 351.

In some cases it has been held that under the laws in force the State was authorized to relinquish its lien for bonds issued to a railroad company in favor of the bondholders, upon payment by them to the State of the indebtedness of the road to the State, consisting of the face value of the bonds and interest thereon. Upon no other terms could the bondholders avail themselves of the lien. *Ralston et al. v. Crittenden*, 8 McCrary, 332.

Where a railroad company has mortgaged its road to the State, and subsequently surrendered the same to the State under an act providing that the right of redemption shall not be barred until a certain time, the courts have no jurisdiction in a proceeding to redeem. *Troy & Greenfield R. Co. v. Comm.*, 127 Mass. 48.

Where the State has reserved a lien upon the property of a railroad, execution cannot issue against such property until the lien is extinguished. *State v. La Grange & M. R. Co.*, 4 Humph. (Tenn.) 488.

Enforcement of Lien.—Where the State has instituted proceedings to foreclose a lien held by it on account of the endorsement of certain railroad bonds, the courts will not enjoin such proceedings at the suit of a holder of bonds of a later issue also indorsed by the State, but which indorsement the legislature has pronounced invalid. *Branch v. Macon & B. R. Co.*, 2 Woods 385.

The lien can only be enforced after the making of the usual appraisal required by law in cases of executions. *State ex rel. v. Nicholls et al.*, 30 La. Ann. 1217.

When a sale is made of a railway under a State lien, the right of property

passes and the corporation is dissolved. *Rogersville & J. R. Co. v. Kyle*, 9 Lea (Tenn.), 691; s. c., 14 Am. & Eng. R. R. Cas. 576.

When negotiable coupon bonds of a railroad company are endorsed by a State, and a statutory lien to the State reserved, under which lien the road is sold, holders of the past due coupons are entitled to no priority, but come *in pari passu* with the bondholders. *South Carolina v. Spartanburg & V. R. Co.*, 8 S. C. 129.

Florida Railroad Aid Bonds and Loans.—For some peculiar decisions in view of the aid bonds and loans made by the State of Florida to railroad companies, see *Doggett v. Railroad Co.*, 99 U. S. 72; *Trustees of Internal-Improvement Fund v. Greenough*, Adm'r, 12 Am. & Eng. R. R. Cas. 345.

CHICAGO AND ATLANTIC R. Co.

v.

DERKES *et al.*

(*Advance Case, Indiana. November 6, 1885.*)

When a unilateral contract or proposition is accepted after its delivery, and the affirmative acts called for and constituting the consideration of such contract, bond, or proposal are fully done, kept, and performed by the party accepting, the proposers cannot be heard to claim that there is want of mutuality in the instrument. When parties get all the consideration they voluntarily and knowingly contract for, they will not be allowed to say they received no consideration, or that it was inadequate; nor will they be permitted to avoid the obligation of their contract with a corporation upon the ground that the company had possibly exceeded its corporate power, or that such contract as to it was possibly *ultra vires* and void.

APPEAL from a judgment of the Adams Circuit Court sustaining a demurrer to portions of the complaint. Reversed.

The case is stated in the opinion.

Jacob S. Slick and *William O. Johnson* for appellant.

David Studabaker, with *R. S. Peterson*, *E. A. Huffman*, *J. T. France*, *W. J. Vesey*, and *J. T. Merryman*, for appellees.

Howk, J.—The error assigned by the appellant, the railway company the plaintiff below, upon the record of this cause, is this: "The court erred in sustaining the demurrer of appellees to the first, second, fifth, sixth, seventh, and eighth paragraphs of appellant's complaint, and to each of such paragraphs separately and severally." As to each of such paragraphs of complainant, the only ground of demurrer assigned by the appellees was that it did not state facts sufficient to constitute a cause of action. Afterwards, and before the filing of the subsequent paragraphs, the record shows that the appellant dismissed its third and fourth paragraphs of complaint.

The suit was against the appellee Derkes, and thirty-two other defendants, all of whom are named as appellees in this court. Each of the paragraphs of complainant remaining in the record after the dismissal, as aforesaid, of the third and fourth paragraphs, counted upon a written instrument executed as alleged, by each and all of the appellees, a copy of which instrument was filed with and made part of each paragraph of complaint. Omitting the names of the appellees subscribed thereto, this written instrument was in the words and figures following, to wit:

"In consideration of the benefits that will accrue to us, in the location and construction of the Chicago & Atlantic R. through the county of Adams, in the State of Indiana, by way of and through the town of Decatur, in said Adams County, in the State of Indiana, we, whose names are hereto attached, hereby acknowledge ourselves bound unto the Chicago & Atlantic R. Co. in a sum sufficient to pay for the right of way across said Adams County, as mentioned aforesaid, this bond to include the right of way already contracted for, and that hereafter to be contracted for or appropriated; this bond, however, not to include switches or depot grounds; for all of which we jointly bind ourselves; provided always that this instrument is not to be binding unless signed by at least thirty responsible citizens of said Adams County.

"In witness whereof we have hereunto set our hands and seals, this 11th day of August, 1881."

In the first paragraph of its complaint, the appellant alleged that it was a corporation, organized under the laws of this State, and that on the 11th day of August, 1881, and prior thereto, it was contemplating the construction of a railroad through the State of Indiana, to Marion, in the State of Ohio, but had not then determined whether or not the line so contemplated should pass through the town of Decatur, in Adams County, Indiana, or some point south thereof; that, for the purpose of securing the location, construction, and operation of such railroad through Adams County, and to and through the town of Decatur, so that it would become a station on such line, the appellees, then and since citizens of such county and each owners of real and personal property in the county, which would be benefited by the construction of such road, executed to the appellant their bond, a copy of which was made part of such paragraph; that such bond was duly signed by more than thirty responsible citizens of Adams County, prior to its delivery to appellant; that, relying upon such bond and being induced thereby, appellant constructed its railroad through Adams County, making the Town of Decatur a point on its line, at a cost greater than it would have incurred had it adopted a line south thereof, and, for that purpose, was compelled to and did procure the right of way through Adams County as cheaply as the same could be reasonably procured; that the necessary cost of such right of way through

Adams County, exclusive of switches and depot grounds, paid by appellant up to July 30, 1883, was the sum of \$9131.95, all of which sum was necessarily paid, at different times, to the various landowners through whose land such railroad passed, in Adams County, and for a more particular statement of persons, amounts, and dates of such payments, reference was made to exhibit B, filed with and made part of such paragraph of complaint; that the sum so paid by appellant, for the purpose of procuring such right of way, with interest thereon from dates of several payments, amounted to \$12,000, no part of which had ever been paid by appellees, or either of them, and the whole of such sum, with interest, was then due; that relying upon the obligation of such bond, appellant necessarily paid out such sum of money for such right of way, and located, constructed, and fully equipped its railway thereon, through the county of Adams, by way of and through the town of Decatur therein, making it a point and station upon such line; that by means of the premises an action had accrued to appellant to recover of the appellees the aforesaid sum of money; and that, although appellant had duly demanded such sum of money of the appellees, yet they had hitherto wholly failed, neglected, and refused to pay the same. Wherefore, etc.

The second, fifth, sixth, seventh, and eighth paragraphs of the complaint each state substantially the same facts, in different language and phraseology from those stated in the first paragraph, and additional facts are alleged in some of those paragraphs. But these additional facts are not material to the questions we are required to consider and decide in this case, and need not, therefore, be further noticed.

We learn from the briefs of counsel that the appellees' demurrers to the several paragraphs of the complaint, remaining in the record, were sustained by the circuit court upon two grounds, namely: 1. Because of the apparent want of mutuality in the contract or bond sued on; and 2. Because the bond or contract in suit was not such a one as the appellant was lawfully empowered to make, but was *ultra vires* and void.

The first of these objections to the contract or bond sued upon, namely; the want of mutuality therein, is certainly not well taken as to any one of the paragraphs of appellant's complaint, upon the facts therein stated. The contract or bond, when it was first executed, was what is sometimes called a unilateral contract, or a proposition merely from the appellees to the appellant. But when, as shown by the facts stated in each paragraph of the complaint, such contract, bond, or proposition, after its delivery by the appellees, was accepted by the appellant, and the affirmative acts on its part called for and constituting the consideration of such contract, bond, or proposition were fully done, kept, and performed by appellant, the appellees cannot be heard to claim there is any want of mutuality in the instrument.

UNILATERAL
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TUALITY.

So far as that question is concerned, the affirmative acts of the appellant done and performed, as alleged, upon the faith of such contract or bond, made it thenceforward the mutual, valid, and binding contract of each and all the contracting parties. This is settled by many decisions of this court. *Street v. Chapman*, 29 Ind. 142; *Smith v. Hollett*, 34 Ind. 519; *Fairbanks v. Meyers*, 98 Ind. 92; *Herman v. Babcock*, decided at present term. [Ante, 477.]

Under the facts stated in each of the paragraphs of complaint, admitted to be true as the case is now presented, the appellees cannot say that the contract or bond in suit is not supported by a sufficient consideration. The bond itself recites the consideration upon which the appellees bind themselves to pay for appellant's right of way across Adams County; and the averments of each paragraph of the complainant show that the appellant had done and performed every act and thing stipulated for, in such bond, by the appellees, in order to secure to them the benefits in consideration of which they executed the bond. It is shown in each paragraph of the complaint that, by and through the affirmative acts of the appellant upon its faith in the bond sued on, the appellees received all the consideration they stipulated for; and in such case, they are in no position to successfully claim either that they received no consideration, or that the consideration was inadequate to support the bond. Where parties get all the consideration they voluntarily and knowingly contract for, it is well settled that they will not be allowed to say they received no consideration. *Baker v. Roberts*, 14 Ind. 552; *Smock v. Pierson*, 68 Ind. 405; *Williamson v. Hitter*, 79 Ind. 233; *Shade v. Creviston*, 93 Ind. 591. The rule is almost elementary, that where parties get all the consideration they bargain for they cannot be heard to complain of the want or inadequacy of the consideration.

2. But it is claimed that the contract or bond in suit was not such a one as the appellant railway company was authorized by law to accept and become a party to, but that it was *ultra vires* and void. Upon the facts stated in each paragraph of the complaint, and admitted to be true by appellees' demurrers, we are not favorably impressed with their position. The appellees admit, as the case is presented here, that they executed to the appellant the bond or contract sued upon, and that the appellant, relying upon such bond or contract and believing that appellees would do what they bound themselves to do, located and constructed its line of railway through Adams County, by way of and through the town of Decatur. After they have thus obtained from appellant all that they bargained for, they seek to escape liability on their bond or contract, upon the ground that the appellant was not authorized by law to become a party thereto, and that, as to it, such bond or contract was *ultra vires* and void.

Without deciding whether or not it was within the corporate power of the railway company to become a party to such

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bond or contract, we are clearly of the opinion that after full performance by the company of the stipulations of such bond or contract on its part to be done and performed, and after the appellees have received in full the benefits they bargained for, they cannot be permitted to escape or avoid the obligation of their contract, upon the ground that the company had possibly exceeded its corporate power, or that such contract, as to it, was possibly *ultra vires* and void.

This question was before this court in *State Board, etc., v. Citizens' St. R. Co.*, 47 Ind. 407, where the railway company sought to escape liability on its contract to pay money, upon the ground that the contract was *ultra vires* and void. The court there said: "It is not claimed, in the case under consideration, that there was any statute by which the street railway company was prohibited from entering into the contract in question, or, in other words, that in making the contract the company violated any statute by which the act was prohibited. All that is claimed is that there was a want of power on the part of the corporation to bind itself by the contract. It is fully shown, on the part of the plaintiff, that the State board of agriculture performed the contract on its part. The street railway company has thus received the benefits and advantages of the contract, but seeks to avoid paying the consideration promised, because it had not the legal power to contract for the benefits which it has actually received. In our opinion, the street railway company is not at liberty to assume this position." To the same effect, substantially, are the following: *Sturgeon v. Board, etc.*, 65 Ind. 302; *Poock v. La Fayette, etc., Asso.*, 71 Ind. 357; *Bicknell v. Widner School Tp.*, 73 Ind. 501.

In *Whitney Arms Co. v. Barlow*, 63 N. Y. 62, the court say: "The plea of *ultra vires* should not, as a general rule, prevail, whether interposed for or against a corporation when it would not advance justice, but, on the contrary, would accomplish a legal wrong. . . . One who has received from a corporation the full consideration of his engagement to pay money, either in services or property, cannot avail himself of the objection that the contract, thus fully performed by the corporation, was *ultra vires*, or not within its chartered privileges and powers. It would be contrary to the first principles of equity to allow such a defence to prevail in an action by the corporation." This language, we think, is forcibly applicable to the case in hand and meets our full approval.

See, also, *Pierce R. R.*, 515 *et seq.*; *Brice, Ultra Vires* (Green), 729, note a.

Our conclusion is that the court erred in sustaining appellees' demurrers to each of the paragraphs of appellant's complaint.

The judgment is reversed, with costs, and the cause is remanded, with instructions to overrule the demurrer to each paragraph of

the complaint, and for further proceedings not inconsistent with this opinion.

Enforcement of Ultra Vires Contract.—See note to *Nassau Bank v. Jones*, 20 Am. & Eng. R. R. Cas. 643.

Mutuality of a Unilateral Contract.—Contracts may be divided into two general classes: bilateral contracts, where each of the parties to the contract makes a promise to the other; and unilateral contracts, where only one of the parties to the contract makes a promise, and the promise is therefore called unilateral or one-sided. The fact that in the case of a unilateral contract only one person becomes bound by the contract does not affect the question of its mutuality. A unilateral contract, like any other, must have a consideration the performance of which by the promisee is necessary to the existence of the contract. In the eye of the law the consideration is given in exchange for the promise and is its full equivalent. The difference between bilateral and unilateral contracts is that in the case of the former each of the two promises is the consideration for the other, while in the case of the latter the consideration for the promise is not another promise, but the actual performance of some act. In the case of the bilateral contract the consideration is a promise to do or not to do some act; in the case of the unilateral contract it is the actual doing or abstaining from doing some act. It may be asked how the promisor in a unilateral contract is secured the performance of the consideration, since there is no promise by the other party to the contract to perform it. The answer is that the promise does not become binding upon the promisor until the consideration has been fully performed. The validity of unilateral contracts is unquestionable. Indeed, such contracts are very common. The contract of insurance is, it is thought, a unilateral contract, the consideration being the payment of the premium or premiums. So, the contract of suretyship or guaranty is ordinarily a unilateral contract.

The following cases uphold the mutuality of unilateral contracts: *Trustees of F. Academy v. Allen*, 14 Mass. 173; *Train v. Gold*, 5 Pick. (Mass.) 384; *Kempton v. Coffin*, 12 Pick. 129; *L'Amoureux v. Gould*, 7 N. Y. 349; *W. O. Collegiate Inst. v. Smith*, 36 Barb. (N. Y.) 581; *Stevens v. Corbett*, 33 Mich. 459; *Michigan, etc., R. Co. v. Bacon*, 33 Mich. 466; *Smith v. Hollett*, 34 Ind. 519.

Adequacy of Consideration of Unilateral Contract.—Where there is a sufficient consideration for a unilateral contract—that is, one which the law recognizes as a valid consideration for a contract—the court will not go into the question of the adequacy or inadequacy of the consideration, its value or worth as an equivalent for the promise given in exchange for it. *Hardesty v. Smith*, 8 Ind. 89; *Major v. Brush*, 7 Ind. 232; *Baker v. Roberts*, 14 Ind. 552; *Williamson v. Hitner*, 79 Ind. 238; *Neidefer v. Chastain*, 71 Ind. 363; *Smock v. Pierson*, 68 Ind. 405. The following cases refer to the question of adequacy of consideration:

The construction of a road is a sufficient consideration for a promise to release a right of way. *Leviston v. Junction R. Co.*, 7 Ind. 597.

Want of consideration cannot be urged as a defence, when the object in aid of which the money was promised has been accomplished. *Peirce v. Ruley*, 5 Ind. 69; *Johnston v. Wabash College*, 2 Ind. 555.

The location of Purdue University in Tippecanoe County was held to be a sufficient consideration to support a promise on the part of the county to pay a sum of money. *Marks v. Trustees, etc.*, 37 Ind. 155.

A written agreement to pay the county a certain sum of money, if the board of commissioners would locate the court-house at a certain point, was held to be a binding obligation. *Stilson v. Board, etc.*, 52 Ind. 218.

A party who promises to donate a railway company, in consideration of

the benefits which he believes will accrue to him, must pay when the condition of his promise is fulfilled. *Hays v. Branham*, 86 Ind. 219.

That the road would have been built on that route without the promise can make no difference. *Stevens v. Corbitt*, 83 Mich. 458.

See also *Underwood v. Waldron*, 12 Mich. 73; *Comstock v. Howd*, 15 Mich. 237.

UNITED STATES

v.

CENTRAL PACIFIC R. CO.

(*Advance Case, United States Supreme Court. May 10, 1886.*)

The United States aided the Central Pacific R. Co. in the construction of its road, receiving bonds of the company in payment. A clause in a statute by which the government was to be paid for the bonds reads as follows: "The whole amount of compensation which may, from time to time, be due to said several railroad companies [among which was the appellee], respectively, for services rendered for the government shall be retained by the United States," etc. The railroad company demanded pay for services rendered the government over a portion of the road which the United States did not aid in constructing, the government claiming that said act covered the whole road. *Held*, that the government was entitled to retain payment only for services rendered over that portion of the road which it had aided in the construction.

APPEAL from the Court of Claims.

Sol.-Gen. Goode, for the United States.

John F. Dillon, J. E. McDonald, Thos. Simons and R. J. Bright for appellee.

WOODS, J.—The appellee, the Central Pacific R. Co., brought this suit in the Court of Claims against the United States, to recover compensation for services rendered the United States in transporting persons and freight over those parts of its railroad in the building of which it had not been aided by the government. The United States demurred to the petition on the ground that it did not allege facts sufficient to constitute a cause of action. The demurrer was overruled, and judgment rendered in favor of the claimant for the sum demanded. From that judgment the United States have brought this appeal.

The appellee alleges in its petition that it was originally incorporated on June 28, 1861, under the laws of the State of California; that, with the aid of the grant of lands in alternate sections, and of bonds of the United States issued to it under the acts of Congress approved July 1, 1862, and July 2, 1864, it built, either directly or indirectly, and became the owner of, 865.66 miles of railroad. In addition to this line of road the construction of

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which was so aided by the United States, the appellee, during the period covered by the petition, controlled and used 383.67 miles of railroad acquired by consolidation with other companies, and 1791.35 miles of railroad leased by it from other companies, making 2175.02 miles, all of which had been constructed without any aid from the United States under the said acts of Congress. The petition demanded pay for service of transportation rendered the United States over the 2175.02 miles of railroad which had been so constructed without their aid.

The contention of the United States was that they were justified in withholding the compensation sued for by virtue of the provisions of section 2 of the act of May 7, 1878 (chapter 96, 20 St. 56), commonly known as the "Thurman Act." We do not think this contention is well founded. The act of July 1, 1862 (chapter 120, 12 St. 489) was passed "to aid," so the title declared, "in the construction of a railroad and telegraph line from the Missouri River to the Pacific Ocean, and to secure to the government the use of the same for postal, military, and other purposes." The act of July 2, 1864 (chapter 216, 18 St. 356), was an amendment to the act of July 1, 1862. By these acts certain railroad companies were aided in the construction of their roads. Among them was the appellee, which built the 865.66 miles above mentioned. It was aided in the construction of this part of its road by an issue of bonds made to it by authority of the acts of July 1, 1862, and July 2, 1864. The act of July 1, 1862, made the following provisions to secure the payment of the principal and interest of the bonds so issued:

"Sec. 5. . . . The issue of said bonds, and delivery to the company, shall, *ipso facto*, constitute a first mortgage on the whole line of the railroad and telegraph," etc.

"Sec. 6. The grants aforesaid are made upon condition that said company shall pay said bonds at maturity, and shall keep said railroad and telegraph line in repair and use, and shall at all times transmit despatches over said telegraph line, and transport mails, troops and munitions of war, supplies, and public stores upon said railroad, for the government, whenever required to do so by any department thereof; and the government shall at all times have the preference in the use of the same for all the purposes aforesaid; . . . and all compensation for services rendered for the government shall be applied to the payment of said bonds and interest, until the whole amount is fully paid; . . . and after said road is completed, until said bonds and interest are paid, at least five per centum of the net earnings of said road shall also be annually applied to the payment thereof."

By the act of July 2, 1864, it was provided as follows:

"Sec. 5. . . . Only one-half of the compensation for services rendered for the government by said companies shall be required

to be applied to the payment of the bonds issued by the government in aid of the construction of said roads."

These sections, taken together, constitute the contract between the United States and the appellee. *U. S. v. Union Pacific R. Co.*, 91 U. S. 72; Sinking-fund Cases, 99 U. S. 700, 718; *Union Pacific R. Co. v. U. S.*, 104 U. S. 662; s. c. 9 Am. & Eng. R. R. Cas. 54. This contract is binding on the United States, and they cannot, without the consent of the company, change its terms by any subsequent legislation. Sinking-fund Cases *ubi, supra*. The provisions of the statute law of the United States being still in force, Congress passed the act of May 7, 1878, being the Thurman Act above referred to. The preamble of this act mentions by name the companies which had been aided by bonds of the United States under the acts of July 1, 1862, and July 2, 1864. The first section declares how the net earnings referred to in those acts shall be ascertained, and the second section provides as follows: "That the whole amount of compensation which may, from time to time, be due to said several railroad companies, respectively, for services rendered for the government shall be retained by the United States, one-half thereof to be presently applied to the liquidation of the interest paid and to be paid by the United States upon the bonds so issued by it as aforesaid to each of said corporations severally, and the other half thereof to be turned into the sinking-fund hereinafter provided, for the uses therein mentioned." THURMAN ACT.

The case turns on the true interpretation of this section, the appellants contending that it authorized them to retain compensation earned for transportation over all the roads owned or leased by the appellee, whether the construction of such roads had been aided by the issue of government bonds or not, and the appellee contending that the compensation referred to was that earned by transportation over that part only of its lines which had been assisted by the government subsidy. The acts of July 1, 1862, July 2, 1864, and May 7, 1878, all relate to the same subject. The latter act is declared by its title to be amendatory of the first two, and its last section provides that each and every of its provisions shall be "held as in alteration and amendment" of the two acts first mentioned. The three acts are therefore to be construed together as one act, and one part to be interpreted by another. *U. S. v. Freeman*, 3 How. 556, 564; *Crespigny v. Wittenoom*, 4 Term R. 793; *Com. v. Slack*, 19 Pick. 304.

One of the provisions of the act of July 1, 1862, closely allied to the one under consideration, was construed by this court in the case of *U. S. v. Kansas Pac. R. Co.*, 99 U. S. 455. The Kansas Pacific R. Co. was one of the companies to which the United States issued bonds in aid of the construction of its road under the act just mentioned. Assisted by

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this issue of bonds, it had built 393 15-16 miles of road. It afterwards built 245 miles without aid from the government. The United States brought suit against the company to recover the 5 per cent of net earnings, to be applied to the payment of the bonds and interest, as provided by section 6 of the act of 1862. One of the controversies in the case was whether the government was entitled to the 5 per cent net earnings on that part of the road which had been built without government aid. This court decided that it was not. Speaking by Mr. Justice Bradley it said: "We are of opinion . . . that the subsidy bonds granted to the company, being granted only in respect of the original road, . . . are a lien on that portion only, and that the five per cent of the net earnings is only demandable on the net earnings of said portion." With this decision in view, it would be impossible to hold, with any show of reason, that the compensation for services rendered the United States, which by the same section was required to be applied to the payment of the same bonds, included compensation for services rendered by a road the construction of which had not been aided by the issue to the company of government bonds.

In the case of *U. S. v. Denver Pac. R. Co.*, 99 U. S. 460, decided at the same term, and in which the judgment was delivered by the same justice, it was held that the United States had no right, under the sixth section of the act of 1862, to retain compensation for services rendered upon a road the construction of which it had not aided by its bonds. The ground upon which the court placed its decision was that the government had no lien except upon a road which it had so aided, and could retain neither the 5 per cent of the earnings of a road to which it had issued no bonds, nor compensation for transportation services thereon.

This court having thus interpreted the act of July 1, 1862, we cannot, consistently with the established rules of construction, give a different meaning to substantially the same words in the act of May 7, 1878. *Reiche v. Smythe*, 13 Wall. 162. In the act of July 1, 1862, the provision is that "all compensation for services rendered for the government shall be applied to the payment of said bonds." In the act of May 7, 1878, the words are that "the whole amount of compensation . . . for services rendered for the government shall be retained by the United States," one-half to pay interest and the other half to be turned into the sinking fund. If the two acts are to be construed together, and as one act, we must give the same meaning to like expressions in both. We cannot say in one case that the compensation mentioned means compensation only for services on aided roads, and in the other that it includes compensation for services on roads not aided.

There is another view of this controversy which seems to us conclusive. As the contract between the United States and the railroad company contained in the acts of July 1, 1862, and of July 2,

1864, has been interpreted by this court to authorize the retention by the government of compensation for services only on those roads which the United States aided in building, the construction which the appellants seek to put on the second section of the act of May 8, 1878, would not only render that section a breach of faith on the part of the United States, but an invasion of the constitutional rights of the appellee. We are bound, if possible, so to construe the law as to lay it open to neither of these objections. *Broughton v. Pensacola*, 93 U. S. 266; *Red Rock v. Henry*, 106 U. S. 596; s. c., 12 Am. & Eng. R. R. Cas. 691; *Hobbs v. McLean*, decided at the present term, and cases there cited; *U. S. v. Coombs*, 12 Pet. 72. The construction contended for by the appellee preserves the good faith of the government, and frees the act from the imputation of impairing rights secured by the constitution of the United States.

In our view the construction of the second section of the act of May 7, 1878, is plain, and not fairly open to controversy. By the act of July 1, 1862, "all compensation for services rendered for the government" was to be applied to the payment of the bonds issued by the United States to aid in building the road. By the act of July 2, 1864, only "one-half of the compensation for services rendered for the government" by said company was required to be applied to the payment of the bonds. The act of May 7, 1878, merely restored the provisions of the act of July 1, 1862, and again required all compensation for services rendered the government to be applied to the payment of the bonds. This compensation, as we have seen, has been limited by the decisions of this court to compensation for services rendered by the aided roads. The construction of the second section of the act of May 7, 1878, contended for by the appellee, is therefore right. Judgment affirmed.

CHICAGO AND EASTERN ILLINOIS R. Co.

v.

WILTSE.

(*Advances Case, Illinois. March 27, 1886.*)

Where the tract for which appellant sought to condemn appellee's land was a branch road intended for the private use of handling the freight of a certain brick-works, *held*, that condemnation of property for such a use is unauthorized by law, and the proceedings should have been dismissed as soon as such purpose became apparent.

APPEAL from county court, Kankakee county.

Wm. Armstrong for appellant.

H. R. Wheeler for appellee.

SHOPE, J.—It will be unnecessary to discuss the errors assigned by appellant, as the determination reached on the cross-errors assigned will be conclusive of the case. The petition as amended was in substantial compliance with the statute, and gave the court jurisdiction, and the motion first entered to dismiss was, upon record as it then stood, properly overruled.

The general act for the incorporation of railroads requires that the terminal points shall be designated and set out in the articles of incorporation, but no limitation is placed upon the company as to the location of its appurtenant tracks, such as side-tracks, turnouts, and switches. The right to locate and build such appurtenant tracks within reasonable limits must of necessity be left in the discretion of the company. The eighteenth section of the act referred to expressly provides that if the corporation is unable to agree with the owner for the purchase of real estate required for the purposes of its incorporation, or the transaction of its business, or for depots, station buildings, right of way, or any other lawful purpose connected with or necessary to the building, operating, or running of its railroad, such corporation may acquire title by condemnation thereof as provided by law. A large discretion of necessity must be lodged in the railroad company, to be exercised through its officers and agents, to determine where side-tracks, turnouts, and switches should be located, with a view to the convenient and successful operation of the main line of the company's road, and as to the amount of land actually requisite for that purpose, and the legislature has given such discretion, providing, however, that such appurtenant tracks for which land is sought to be condemned shall be connected with the building, operating, or running of the railroad, or necessary to such building, operating, or running.

The question of the necessity for the exercise of the right of eminent domain, and in what cases it will be exercised, within the constitutional restrictions, is legislative, and not judicial; and when the power has been delegated to an incorporation by the legislature, the exercise of that power by the incorporation, within the scope and for the uses and purposes named in the legislative grant, will not be a proper subject for judicial interference or control, unless to prevent a clear abuse of the power. The question, however, of whether the use to which it is sought to appropriate the property is a public use or purpose, and whether such use or purpose will justify the exercise of compulsory taking of private property under the statute and constitution, and, where the power is attempted to be exercised

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by an incorporation, whether the power is delegated to the corporation by the legislature, and whether the uses and purposes for which the power is sought to be exercised fall within the legislative grant of power,—are proper subjects of judicial determination. *Dill. Mun. Corp.* 465; *Chicago, R. I. & P. R. Co. v. Town of Lake*, 71 Ill. 333; *South Chicago R. R. v. Dix*, 109 Ill. 237; s. c., 17 Am. & Eng. R. R. Cas. 157; *Dunlap v. Mt. Sterling*, 14 Ill. 251; *Cooley, Const. Lim.* 537 *et seq.*; *St. Louis, etc., R. Co. v. Trustees, etc.*, 43 Ill. 306; *Chicago & W. I. R. Co. v. Dunbar*, 100 Ill. 129; s. c., 5 Am. & Eng. R. R. Cas. 253; *Smith v. Chicago & W. I. R. Co.*, 105 Ill. 511; s. c., 14 Am. & Eng. R. R. Cas. 384; *In re New York Cent. & H. R. R. Co.*, 77 N. Y. 248; *Eldridge v. Smith*, 34 Vt. 484; *Bradley v. New York & N. H. R. Co.*, 21 Conn. 305.

It is evident from the evidence in this case that the sole use and purpose of the proposed track was to reach the brick-works situated between a half and three-quarters of a mile from ^{PURPOSE OF} appellant's railroad, and thereby create a feeder to its ^{PROPOSED} main line and add to the volume of its freights. ^{ROAD.} There is no pretence that there was any necessity for any increased facilities in the locality of the proposed track, except for the purpose of serving the hauling of brick from these brick-works, and the increased traffic brought to appellant's main line by the building of this spur. True, the superintendent says the track could be used to store cars upon; but it is in the country, and there is no pretence that there is or will be any necessity for, or that it will be convenient to store, cars at this point, or that the track was intended for such use. Besides, the track is shown to be designed for use by running cars over it each day. Indeed, so patent is it from the record that the proposed track was a spur road, intended for the use indicated, that the only statement by appellant's counsel, in his brief, of the use for which appellee's land was to be appropriated is as follows:

"The appellee being the owner of some land located between the railroad and the brick-works, appellant filed this petition to condemn a strip thirty feet in width across his land, in order to build a railroad track from its main track to the brick-works, as described."

Towards the close of his argument the counsel insists upon the great expense incurred in building up the brick-works, the great volume of freight thereby produced, and the loss if compelled to move the brick from the kilns to the railroad in wagons, as reasons for the exercise of this compulsory power of taking appellee's land, and concludes: "To say that appellant has no power to build a spur to the works in order to move this vast volume of freight is placing a narrow construction on the powers of appellant."

It is conceded substantially, and the evidence abundantly shows the fact, that this proposed track in no way increases or adds to the facilities for transacting the business of the railroad appellant is authorized by its charter to build and operate; but, on the contrary, by adding to the volume of its freights, would tend rather to embarrass the main line of road than otherwise. If this was a side-track, and was in some way necessary to or aided in the convenient and successful operation of appellant's railroad, the fact that it serves the private use mentioned would not, as said by the court in *South Chicago R. Co. v. Dix*, *supra*, make it any the less necessary as a side-track; but there is no such pretence here, and the right to condemn appellee's land depends upon the right of appellant to build an independent branch road from its main line to the brick-works for the purpose of creating a feeder to its main line of road, or, as put by counsel, "to move this vast volume of freight." In no just sense can this proposed line be said to be connected with or necessary to the building, operating, or running of appellant's railroad.

The taking of private property under the eminent domain statutes is in derogation of common right, and the grant of power to incorporations for its exercise will be strictly construed. *Cooley*,

STATUTES GRANT-
ING POWER OF
EMINENT DOMAIN
STRICTLY CON-
STRUED.

Const. Lim. 520, 531, and authorities cited. The fact that the building of collateral branch roads may add to the earnings of the main line or increase its business will not authorize appellant to build the same under its charter and condemn lands therefor. *South Chicago R. Co. v. Dix*, *supra*; *Currier v. Marietta & C. R. Co.*, 11 Ohio St. 228; *Young v. McKenzie*, 3 Ga. 44; *Taylor v. Porter*, 4 Hill, 146; *Buffalo & N. Y. R. Co. v. Brainard*, 9 N. Y. 103. Nor is it material to the determination of this question that the proposed

LAND CANNOT BE
TAKEN FOR
PRIVATE USE.

track is only a half or three-fourths of a mile in length, or that the great loss would occur to the brick-works company if it be not built. Appellee's land is sought to be taken, and it can, as to his right, make no possible difference whether the proposed line be long or short. In principle, it could make no difference. If the railroad company may condemn appellee's land for the purposes indicated, why can it not build any distance it may choose for like purposes, or from Danville, its southern terminus, to St. Louis, if thereby its revenues would be increased, and the interests of the points to which it should build be promoted thereby? The legislature has conferred no such power upon appellant. It therefore was made apparent from the proofs that the purpose and use intended was not such use as is contemplated by the grant of power under which appellant was acting, and that therefore no appropriation of appellee's land for such purpose could be made, and it was then the duty of the county court to arrest the further proceedings and

refuse the aid of the court in wresting appellee's land from him for an unlawful use.

It is said by this court in *Smith v. Chicago & W. I. R. Co.*, *supra*, that "this right [of the exercise of the right of eminent domain], of course, is subordinate to all statutory and constitutional restrictions on the subject, and also to the further limitation that the courts of the State which are authorized to entertain applications of this character are clothed with ample power to prevent any abuses of this right by such companies." In the case of *South Chicago R. Co. v. Dix*, *supra*, the question was raised by motion entered in the county court to dismiss the petition, which motion was supported by affidavit filed in said court, showing the reasons for such motion. The company filed counter-affidavits, and on consideration of the motion, that court dismissed the petition. On appeal to this court the judgment of the court below was reversed; this court finding, upon consideration of the facts established by the petition and affidavits, that the use for which the condemnation was sought was necessary for the convenient and successful operation of the railroad, and therefore a lawful purpose.

The powers of the court were invoked by appellant to aid it in the appropriation of this land for a lawful purpose; and that it should under this guise be permitted to use the court to enable it to appropriate appellee's land to an unlawful purpose, and by its orders invest appellant thereunder for such unlawful purpose, would be a travesty upon the administration of the law. It, therefore, we think, became the duty of the county court, upon it appearing that the land of appellee could not be lawfully taken for the purposes really intended, to have discharged the jury, and dismissed the petition at the petitioner's costs, and for the error in not so doing the judgment will be reversed, and cause remanded to the county court of Kankakee county, with direction to set aside the judgment entered, and enter an order dismissing the petition.

Side-tracks—Condemnation of for Private Use.—See *McAbey v. Pittsburgh*, etc., R. Co., 20 Am. & Eng. R. R. Cas. 814; *Tracy v. Elizabethtown*, etc., R. Co., 14 Ib. 407; *Balto. & Ohio R. Co. v. P. W. & B. R. Co.*, 10 Ib. 444.

JOHNSON

v.

FREEPORT AND M. R. R. Co.

(Advance Case, Illinois. March 27, 1886.)

The petition in this case was filed by appeal for the condemnation of certain lots in the city of Galena, owned by Ann Eliza Johnson, for the purpose of building and maintaining a railway from Freeport, in Stevenson county, to Galena, in Jo Daviess county. The petition alleges that the owner's husband, who is also made defendant, is one Madison Y. Johnson. Such husband was duly served with process as defendant; but is not himself alleged to be the owner of any interest in the property independent of the interest owned by his wife. Said Madison Y. Johnson filed his cross-petition, setting up that heretofore the State of Illinois had acquired the right of way for a railway across the property involved in this petition, and had erected an embankment and roadbed and certain culverts and crossings in and upon this property; that thereafter the State of Illinois had abandoned this system of internal improvements, but retaining all the rights, privileges, and property acquired in the course of erecting such improvements, including the properties herein described; that thereafter the State of Illinois had incorporated the Galena & Mississippi Intersectional R. Co., which, under its charter, acquired the title to the right of way, roadbed, and other properties acquired and erected by the State of Illinois, as above mentioned, in the construction of said system of internal improvements; and that thereafter this company, at a meeting of the directors, by a unanimous resolve, assigned and conveyed to Madison Y. Johnson, president of said company, all such property, right of way, etc., to be held or disposed of by him as he might deem proper for the best interests of the city of Galena; that thereafter Madison Y. Johnson made an agreement with the Western Union Co., by which they were to construct said railway, but before constructing the same said last-named company was absorbed by the Chicago, Milwaukee & St. Paul R. Co., and that negotiations are now pending to make the transfer of said interest to the said Chicago, Milwaukee & St. Paul R. Co. The cross-petition further alleges that said right of way and roadbed are public property, and cannot be condemned, and prays that the original petition may be dismissed for want of jurisdiction, so far as it seeks to condemn the right of way already mentioned, or to take the embankments and other improvements therein described. In the trial court the cross-petition was dismissed upon motion. This is held to be erroneous. The uncertainty in the description of appellee's interest is held to be proper for consideration on demurrer, but not ground for dismissal upon motion. The objection that the cross-petition rests upon the denial of the right of longitudinal condemnation of the line of railway is not ground for dismissal upon motion, and the allegation that the cross-petitioner is holding this right of way for some future use of some railroad company is not only a ground upon which such right of way may be condemned upon the proper state of facts, but also a ground upon which the cross-petitioner would be entitled to have compensation assessed to him if he should prove entitled to any. The cross-petition plainly discloses the right to have all the issues suggested therein properly tried and determined, and his compensation, if any, decreed, and presents no ground upon which a summary dismissal upon motion can be sustained.

Under section 11 of the eminent domain act (Curtis, St. c. 47, p. 11), a defendant is obliged to file a cross-petition in order to bring to the attention of the court a claim of ownership which is not set forth in the petition. A dismissal of the cross-petition which sets up a new and additional interest eliminates from the case such new and additional interest, and is in the nature of a final disposition of the rights claimed under it. The cross-petitioner is therefore entitled to a separate appeal from the final action of the court in dismissing his cross-petition.

APPEAL from Jo Daviess.

M. Y. Johnson for appellant.

B. C. Cook for appellee.

MAGRUDER, J.—This is a petition filed by appellee in the county court of Jo Daviess county, to condemn the right of way over certain lands of various persons therein mentioned, and to FACTS. condemn certain lots in Galena for depot purposes. The petition is in the usual form, and recites that the company is organized and legally existing, as a corporation, under the general railroad and corporation statutes of Illinois, and that its object and purpose are to build and maintain a railroad from Freeport, in Stevenson county, to Galena, in Jo Daviess county, with a branch line to connect with the Chicago & Northwestern R., at or near Fulton, in Whiteside county. It mentions, among other pieces of property which the petitioner desires to take and appropriate, certain lots in the city of Galena, owned by Ann Eliza Johnson, and alleges that her husband's name is Madison Y. Johnson. Madison Y. Johnson was made a defendant to the original petition, and duly served with process; but he is not otherwise mentioned therein, except as the husband of Ann Eliza Johnson. He is not himself alleged to be the owner of any interest therein, independent of the interest owned by his wife. Accordingly, Madison Y. Johnson, appellant here, filed his cross-petition in said proceedings, setting up that the State of Illinois inaugurated a general system of internal improvements, and, among other improvements, undertook to construct a railroad from a point in Galena, along the line mentioned in the original petition, to Savanna, in Carroll county; that the State established the route of said railroad along the same lands and route mentioned in the original petition, and secured from the general government, where the land had not been sold by it, the right of way, and, where the title had been acquired by individuals, had purchased and obtained the right of way from the owners of said lands; and that said right of way, so obtained, did absolutely vest in the State "as an absolute fee in said property;" that the State made excavations, embankments, culverts, stone-work, and other and necessary work along said route described in the original petition, for its railroad, for the distance, between Galena and Savanna, of about twelve miles, and took possession thereof, and built and constructed and

graded the same on the line aforesaid, and expended, in the construction and for right of way, in Galena, and along said line, more than \$200,000, when it abandoned said system of internal improvements, so adopted by it, leaving said embankments, stonework, right of way, and privileges, so secured to it, without completing or finishing the railroad so intended and commenced under the system so adopted by it, but retaining all rights, privileges, and property so acquired under said system; that the State, by an act of the legislature, incorporated the Galena & Mississippi Inter-section R. Co.; that by the second section of said charter it is provided, among other things, that said corporation may appropriate to its sole use, and enter upon, take possession of, and use all and singular any lands, streams, and materials of any name and kind for the location of depots, and may construct bridges, dams, and embankments, spoil-banks, engine-houses, and other necessary buildings to preserve and maintain and continue said railroad, and "all such lands, waters, materials, and privileges belonging to the State are hereby given to said corporation for said purposes," etc.; that it was further enacted, in the fifth section of said charter, that the corporation thereby created was fully authorized to consolidate with any other railroad within the State of Illinois or elsewhere, and all the rights secured to either were thereby secured and confirmed to the consolidated company; that it was further enacted, by the sixth section of said charter, that all grants therein contained should cease and be void, unless accepted by said company within ninety days after the passage of said act, it being a public act, and to be construed liberally for the purposes declared, etc.; that under said charter the company organized, subscribed stock, elected officers, and became a legal corporation, and, within the time named in its charter, certified to the governor of the State that they accepted the charter and grants therein mentioned; that at a meeting of the directors of said company, who were the stockholders of the company, a resolution was unanimously adopted, and spread upon the records thereof, that all the interest, with all rights, privileges, and advantages secured to the Galena & Mississippi R. Co., under the charter granted to said company by the State, and the acceptance of the right of way, as certified to the Secretary of State, together with the charter, franchises, stock, and property, and right of property, of every name and kind, secured and belonging to said company, were thereby assigned unto Madison Y. Johnson, the president of said company, to be held or disposed of by him as he might deem proper for the best interests of the city; that Madison Y. Johnson made an arrangement with the Western Union R. Co. to construct said railroad, but, before constructing the same, said last-named company was absorbed by the Chicago, Milwaukee & St. Paul R. Co.; that negotiations are pend-

ing to make a transfer of said interest to the Chicago, Milwaukee & St. Paul R. Co.

The cross-petition alleges that the right of way and roadbed therein described are public property, and cannot be condemned, and the prayer of the cross-petition is that the original petition may be dismissed for want of jurisdiction, so far as it seeks to condemn the right of way already mentioned, or to take the embankments, grading, curves, and fills or superstructure embraced and included in the lands and right of way mentioned in the original petition, or that the court may make such other orders in the premises as may seem just and proper under the laws, etc. After arguments heard, the court below dismissed the cross-petition.

The appellee has filed a motion to dismiss the appeal in this court, on the ground that the order of the court below dismissing the cross-petition was not a final order. We think that the order of dismissal was final, and that an appeal can be taken from it. The cross-petition sets up an interest which was not mentioned in the original petition. The proceedings under the original petition could only have reference to the lands, and interests in land, which were therein described. Under the statute, the appellant was obliged to file a cross petition, in order to bring to the attention of the court a claim of ownership which was not yet before the court. When, therefore, the cross-petition was dismissed, the new and additional interest which was thereby presented was no longer in the case. There was no pleading under which it could be considered. Hence it follows that the dismissal of the cross-petition was a final disposition of the rights claimed under it. In proceedings under the eminent domain act, each separate owner may have his damages assessed before a separate jury, and so is entitled to a separate appeal from the judgment rendered on the verdict. Such, also, is the case where different persons have several and distinct interests in the same tract. *Bowman v. Venice & C. R. Co.*, 102 Ill. 459. In this very suit for condemnation, two appeals have already been entertained and disposed of by this court, to wit, *Johnston v. Freeport & M. R. Co.*, 111 Ill. 13, and *De Boul v. Freeport & M. R. Co.*, Id. 499. The objections here urged by appellee to the cross-petition, that it was only evidence of title, and not any actual present title in appellant, and that it is uncertain in the description of appellant's interest, might be very proper for consideration on demurrer to the cross-petition when filed, but form no ground for dismissing the same on motion.

It is said that appellant, as an individual, cannot be the assignee of the right of way of a railroad company; that it is a corporate franchise. We do not understand a right of way to be itself a corporate franchise, but that it is property acquired in the exercise of such franchise.

CROSS-PETITION.
DISMISSAL.

Appellee insists that, granting everything stated in the cross-petition, either of fact or inference, still there is nothing in the case; that the allegation and claim of the cross-petition is based upon the assumption that this right of way cannot be condemned because it would be condemning a line of railroad longitudinally, and that there is no railroad corporation complaining here. This might be answer sufficient if the petition rested alone upon denial of the right of condemnation. Appellee says further: "If it be claimed that appellant is holding this right of way for some future use of some railway company, the answer is that it may be condemned." This is just what appellant is claiming. Then, why may not his cross-petition be entertained to have the compensation assessed to him, if entitled to any, for the taking of the property? Although the gravamen of the cross-petition is that one railroad company cannot condemn the right of way and roadbed of another railroad, and it does not specifically claim or pay for the assessment of any compensation to appellant, yet, under all the averments of the cross-petition, we think there might thereunder be made assessment to appellant of any compensation to which he might be entitled. The cross-petition avers that the petitioner files it under the eleventh section of the Eminent Domain Act, wherein it is provided "his rights shall be fully considered and determined," and the prayer is that the original petition be dismissed, so far as it seeks to condemn the right of way mentioned in the petition, "or that the court may make such other orders in the premises as to the court may seem just and proper under the law," etc. Without intimating any opinion as regards any right of appellant either in the property or to compensation, we think he should have been allowed opportunity to make the same appear, if he could, under his cross-petition, and that it was error to dismiss the cross-petition upon motion. The order of dismissal of the cross-petition will be reversed, and the cause remanded.

Condemnation by one Company of Line of Another Road.—See *Chicago, etc., R. Co. v. Joliet, etc., R. Co.*, 14 Am. & Eng. R. R. Cas. 62; *Denver, etc., R. Co. v. Denver, etc., R. Co.*, 14 I. 83; *Fitchburg, etc. R. Co. v. New Haven, etc., R. Co.*, 14 Ib. 95, *Phila., etc., R. Co.'s Appeal*, 20 I. 1.

Injunction to prevent One Road interfering with Another about to cross it.—An injunction granted to prevent one railway interfering with another railroad laying its track across its right of way and tracks, without notice, and before the case is determined on its merits, and final decree, is illegal. The court say: "It needs no discussion to show that an injunction against a party's holding his own possession is the same thing as turning him out of possession, and is utterly illegal before final decree. Whatever right a complainant may have in other courts, or in other ways, a court of equity cannot change the possession of lands in conflict from one party to another until the merits have been finally passed upon. It seems singular that any officer of the law should undertake such a usurpation of power. It has been sufficiently settled by several decisions of this court, and is an elementary rule

which needs no explanation. *People v. Simonson*, 10 Mich. 385; *Barry v. Briggs*, 22 Mich. 201; *Lewis v. Campau*, 14 Mich. 458; *Salling v. Johnson*, 25 Mich. 489; *Port Huron & G. R. Co. v. Judge of St. Clair*, 81 Mich. 456; *Arnold v. Bright*, 41 Mich. 207; *Tawas & B. C. R. Co. v. Judge of Iosco*, 44 Mich. 479.

Railway Company's Duty to maintain Public Highway—Mandamus.—A turnpike road laid out and constructed under the authority of the charter of a turnpike company is a public highway, and the forfeiture of the charter, and the consequent abandonment of the road by said company, do not affect the existence of the road as a public highway, which should thenceforth be maintained in good order by the municipality within which the road is located. A railroad company, which enters upon upon and appropriates a portion of a road, which had formerly been a turnpike road, but which, owing to the forfeiture of the turnpike company's charter, had been abandoned by the turnpike company, though it continued to be used by the public, is bound to cause the said road to be reconstructed under the provisions of the act of February 19, 1849 (Pa. L. 85), and, in case of refusal, will be compelled by *mandamus* so to do. *Pittsburgh, etc., R. Co. v. Commonwealth*, 104 Pa. St. 588.

CASSIDY

v.

OLD COLONY R. Co.

(*Advance Case, Massachusetts, February 25, 1886.*)

The right of a railroad company to the use of the land condemned for its right of way is a continuing right to all uses necessary and incidental to the safe and beneficial occupation of its roads, by raising or lowering grade, cutting down hill, and removing trees; and where it is owner of the fee by deed of conveyance from the original owners, it has all the rights that any other owner of the fee would have, so long as it does not infringe any common land rights of adjacent owners, without being liable to further damages for cutting off natural drainage, discharging surface water from its roadbed, and shutting off the view, light and air from adjoining premises.

On petitioner's exceptions. Overruled.

Petition in Superior Court for a jury to assess damages incurred in the use and occupation of land and dwelling house by reason of respondent's elevating its roadbed adjoining petitioner's land.

In 1845 the defendant company located its railroad over a strip of land owned by one Wolkins, who afterwards conveyed the strip covered by the location to the company. In 1882 the company raised the grade of its railroad on this strip, and interfered with the natural flow of the surface water from the adjoining land upon

it, and also caused surface water from the location to flow upon the adjoining land, and shut off the view, light and air therefrom. It is conceded that this change of grade "did not interfere with any drainage or flow of water other than surface water."

The owner of the adjoining land, holding under a conveyance from Wolkins, brought a petition against the company for damages caused to that land by change of grade of the railroad upon the strip located upon by the company, and conveyed to it by Wolkins. The Superior Court ruled that the petition could not be maintained, and the question is whether that ruling was wrong.

N. C. & J. K. Berry for petitioner.

J. H. Benton, Jr., for respondent.

HOLMES, J.—The taking of land for a railroad "is an appropriation of the land to all the uses of the land for the road, necessary and incidental. . . . Practically the damages are commonly equal to the value of the land."

"The rights and power of the company to use the land within their limits may not only be exercised originally, when their road is first laid out, but continues to exist afterwards; and if, after they have commenced operations, it is found necessary in the judgment of the company to make further uses of the land assigned to them for purposes incidental to the safe and beneficial occupation of the road by raising or lowering grade, cutting down hills and removing trees, they have a right to do so to the same extent as when the railroad was originally laid out and constructed." *Brainard v. Clapp*, 10 Cush. 6, 8, 10; *Callender v. Marsh*, 1 Pick. 418, 432.

Thus the law stood at the time of the location of this railroad in 1845, and thus it still stands, unless special provision for further compensation is made by statute. *Boston v. Richardson*, 13 Allen, 146, 159; *Pierce v. Drew*, 136 Mass. 75.

It follows that the defendant must be presumed to have paid for the damage now sought to be recovered for, at the time of its original location, so far as such damage was proper to be considered. And even if the statutes now provided proceedings to recover damages against railroads in case of a subsequent change of grade, it would require a pretty strong argument to convince us that they were intended to give further damages in a case where full compensation had been paid originally. No such statute, however, has been called to our attention.

Again; the claim stated by the petitioner, which the court ruled was for cutting off all natural drainage of surface water from the adjacent lands, discharging surface water from the respondent's roadbed upon the adjoining land of the petitioner and shutting off the view, light and air from the petitioner's premises. None of these acts infringed any common land rights of the petitioner. They would have been perfectly lawful on the part of any other

adjoining owner. *Gannon v. Hargadon*, 10 Allen, 106; *Franklin v. Fisk*, 13 Allen, 211; *Bates v. Smith*, 100 Mass. 181; *Rathke v. Gardner*, 134 Mass. 14; *Keats v. Hugo*, 115 Mass. 204.

And we are not aware that it has been decided in this commonwealth that they form a substantive ground of recovery under the Railroad Acts, although if land was taken, as it was from the petitioner's predecessor in title, at the time of the original location some portion of this kind of damage to the remaining land might be considered according to *Walker v. Old Colony & N. R. Co.*, 103 Mass. 10; see *Morrison v. Bucksport & C. B. Co.*, 67 Me. 363.

However this may be as against a railroad exercising such rights, only as it acquires by its location and subject to the duties imposed by statute, in the present case the respondents owned the fee by conveyance from the petitioner's predecessors in title, and had all the rights as against the petitioner that any other owner of the fee would have had. The petitioner treats the deed as if it were a mere release of the damages then due for the original location. But it is a conveyance in ordinary form, and it had the same effect that a like deed to any other person would have had.

RAILROAD HAS
RIGHTS
OF
OWNER IN FEE.

It is suggested that the petitioner had acquired an easement of draining through the sluiceway built under its road by the respondent. No such claim appears to have been made at the trial. But if it had been made, it could not have been maintained. For no lapse of time gives a man a right to drain surface water in its natural state upon his neighbor's land, and the fact without more, that after it reaches that land it escapes by a ditch, makes no difference. If the petitioner had had a ditch upon his own land the discharge from which would have been a wrong and actionable, acquiescence in the discharge for twenty years would have given him a right. But that is not this case.

Exceptions overruled.

HIBERNIA UNDERGROUND R. Co.

v.

DE CAMP *et al.*

(47 *N. J. Law*, 518.)

A corporation formed under the supplement of the general railroad act, approved March 12th, 1879 (*Pamph. L.*, p. 166), acquires, on condemning a right of way an for underground railroad, not the fee-simple of lands, but an easement only.

Such a corporation cannot condemn the mere privilege of maintaining a

railroad only until the landowner shall choose to make an inconsistent use of the site of the road-bed.

Such a corporation cannot, by eminent domain, compel an owner of the fee-simple of land to yield to it a right to construct and operate a railroad on the happening of a future contingent event.

The rights which such a corporation is authorized to acquire by condemnation are present rights, and whatever may be necessary to make present rights perpetual.

In error. For opinion of Supreme Court see 47 N. J. Law, p. 43.

Henry C. Pitney (with whom was *Mahlon Pitney*) for plaintiff in error.

Cortlandt Parker (with whom was *Alfred Mills*) for defendants in error.

DIXON, J.—This writ of error brings up a judgment of the supreme court setting aside an order appointing commissioners to appraise certain property which the Hibernia Underground R. Co. seeks to condemn.

The company was organized under the General Railroad act
FACTS. and its supplements, for the purpose (as its articles of association state) of purchasing, operating, and maintaining a certain railroad already constructed, running about two thirds of a mile, wholly underground, through the Hibernia vein of iron ore in Morris county, to be used for the transportation of minerals, and of materials, implements and machinery for the sinking and working of mines. This railroad having been purchased, the company finds that the only right to maintain the same, on what is called the "De Camp mine lot," is derived from a lease which expires in 1894; and the proceedings now before us were instituted with the view of acquiring the right of perpetually maintaining the road across this lot, about ten chains in length.

The company's petition describes the property to be condemned (so far as the description is pertinent to the present inquiry) in the following language: "The right to perpetually maintain and
COMPANY'S PETITION. operate the Hibernia Underground R. as at present constructed and operated, being a railroad with a single track of the gauge or breadth of two feet and nine inches between the rails, and operated by steam locomotives and cars not exceeding six feet and six inches in breadth and eight feet in height, in, through and along that portion of the Hibernia tunnel . . . known as the 'De Camp mine lot.' . . . The centre line of said railroad, where it crosses said 'De Camp mine lot,' is described as follows: Beginning, etc. . . . Also the right to repair, renew, and alter said railroad as occasion may require. Including the right, for the purposes aforesaid, to enter upon and occupy so much of said tunnel as lies within four feet of said centre line on each side thereof. . . . These proceedings are not intended to

acquire any right or easement of support for the tracks or road-bed of said railroad by the ores lying beneath said tracks and road-bed, but the present and future owners of said 'De Camp mine lot' are to be at liberty, after reasonable notice to said Hibernia Underground R. Co. or their successors or assigns, to mine and remove all or any part of the ores lying beneath said road-bed, notwithstanding the removal thereof may weaken or destroy the support of said road-bed. And further, in case at any time the support of said road-bed shall happen to be destroyed or materially weakened by reason of the removal in whole or in part of the ores lying beneath the same, then and in such case the said Hibernia Underground R. Co. and its successors and assigns, are to have the right to support said road-bed by timbering placed across said tunnel or by other means, or to make an excavation in the southeasterly or hanging-wall of said vein, for the purpose of providing a road-bed for said railroad; such excavation not to exceed the breadth of eight feet, measured from the face of said hanging-wall, and the height of eight feet, and to extend along said hanging-wall across said lot of land at the same level as the present floor of said tunnel."

One question raised by the land-owners is whether the rights thus defined were such as the company could lawfully condemn, and the decision of this question against the company in the supreme court is the matter now complained of as error.

The specific authority which the company aims to put in force is conferred by a supplement to the General Railroad act, approved March 12, 1879 (Pamph. L., p. 166), under which the company was organized. This supplement enacts that ^{SUPPLEMENT TO GENERAL RAILROAD ACT.} "When any corporation formed under the provisions of this act shall take legal proceedings to acquire the right of way for its proposed railroad beneath the surface of the earth, such right of way shall not include the right to permanently use or occupy the surface of the earth immediately above such railroad and where the same is not broken, but shall be confined to a mere right to tunnel and excavate the earth for its tracks;" and if the company has purchased a railroad already constructed, but has not acquired the right to maintain the same from the owners of the fee simple of any lands upon, under or through which it is built, then "it shall be lawful for the corporation owning and operating said railroad to take and prosecute all such legal proceedings, to acquire the right to maintain and operate its said railroad, that it would have the right to take and prosecute if such railroad had not as yet been built." The supplement also declares that companies formed under it shall have all the powers, and may exercise all the franchises conferred upon, and which may be exercised by corporations formed under the original act; but we do not think that these general expressions can enlarge the scope of the special authority

granted by the supplement for the condemnation of a right of way beneath the surface of the earth. In designating the rights which the company was to obtain under this special authority, the language used is so explicit as to prevent any inference gathered from general terms; it not only indicates what shall not be acquired, but also expressly declares to what the acquisition shall be confined.

We deem it clear that corporations formed to construct or maintain underground railroads are not entitled to condemn the fee-simple of lands for their right of way. What they can acquire is a right to tunnel and excavate the earth, a right to maintain and operate the railroad. We need not examine or cite the many cases which have held that terms much more indicative of a fee, when used in a grant of eminent domain, import only an easement. All the decisions agree in laying down these principles, that the corporation can take what the legislature has authorized it to condemn, and nothing more, that the authority must be expressly granted or necessarily implied in the express grant, and that it must be strictly pursued. Under these principles, the phraseology used in the statute cannot mean ownership of the land; it must mean only a right to construct, operate and maintain a railroad upon, through and under the land of another.

The petition, therefore, is correct in asking the condemnation, not of land, but of the right to maintain and operate the railroad. This right, however, when acquired, would be paramount, and the land-owner could lawfully do nothing which would impair it. He might make any use of his land consistent with the maintenance and operation of the railroad; as owner of the ores beneath the road-bed, he might remove them, but always subject to this, that he should not weaken the road or materially interfere with the convenience of its operation. This would be the legal consequence of the condemnation by the company of a right to permanently maintain and operate the railroad as constructed. The petition, however, seeks to avoid this consequence, and to reserve to the land-owner the absolute right of removing the ore at his pleasure, without regard to the structure resting upon it. In other words, instead of the permanent right to support the railroad in its present position, which the statute expressly authorizes the company to condemn, the company proposes to take only a temporary privilege of support, until the land-owner shall see fit to remove the ore. Thus we are brought to the question whether the express grant of power to condemn the permanent use implies an authority to condemn a temporary use. A somewhat similar question was answered affirmatively by Chancellor Kent in *Jerome v. Ross*, 7 Johns. Ch. 315. There the canal commissioners had express authority to enter

UNDERGROUND
ROADS
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RIGHT TO MAINTAIN
ROAD.

AUTHORITY TO
CONDEMN
FOR
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TEMPORARY
USE.
YORK

upon, take possession of and use any lands, waters and streams necessary for the prosecution of the improvement, doing no unnecessary damage; and it was insisted that the power could be exercised only for the permanent appropriation of the whole fee; but the court held that the commissioners were not obliged to appropriate a greater interest than was requisite for the public object, and that they might take possession of and use land, temporarily, for the purpose of quarrying stone with which to build a dam required by the canal. This view seems to have been subsequently sanctioned by the Court of Errors in *Lyon v. Jerome*, 26 Wend. 485. On the other hand, in *Currier v. M. & C. R. Co.*, 11 Ohio St. 228, where, under an ordinary power to take land for the construction and operation of a railroad, the company sought to condemn a right of way, already occupied by it, for three years, to be used while its permanent road was building, the court said: "The road contemplated by the charter is a permanent thing; the lands to be taken for it, it is evident, were designed to be taken permanently, once for all. No such thing as a temporary appropriation of land is, in the charter, expressly mentioned, nor does it anywhere seem to have entered the mind of the legislature. . . . We think that by no fair, and much less by any strict construction of the powers granted to this corporation, can the appropriation claimed be brought within them."

It is noticeable that the New York cases differ from the one before us in several respects. The right of temporary appropriation was there conceded, because, for the purpose in view, that only was necessary to carry out the legislative design. But here the legislative design, as gathered from the statute and the company's articles of association, will apparently not be satisfied by the maintenance of the railroad simply until the land-owner shall choose to remove the ore in the road-bed; and the petition itself, in recognition of this fact, seeks to substitute another road, when the existing site shall be destroyed, in order to accomplish fully the object of the incorporation. So that this ground, relied on by Chancellor Kent, for inferring a right to temporary occupation, is wanting in the present instance. In the case of the canal commissioners, also, the right required was reasonably definite, as to both duration and use—possession until stone could be quarried sufficient for the building of a certain dam; so that a fair appraisal of the right was practicable, especially in view of the fact that the appraisal could legally be postponed until the use was ended. But here compensation must be made before possession is taken, and the appraisers must, therefore, say in advance what a right of possession is fairly worth, when the possession can lawfully be forthwith terminated by him to whom the compensation has been paid. Such an appraisal would, in most cases, be a mere guess, and rarely could result in the ascertainment of just compensation, which is a con-

stitutional prerequisite to the condemnation of property by individuals and private corporations.

I cannot, therefore, rid my mind of grave doubts whether the legislature has authorized the taking of such a limited privilege in the present site of the railroad, as the petitioner demands, and because of these doubts must deny that the power has been granted.

But the petition does not stop at the existing road-bed. Conceiving that the needs of the company may outlast the willingness of the land-owner to leave the ore for the maintenance of the superstructure, it prays the condemnation of a further right, in the event of the removal of the ore, to support its tracks upon other property of the owner, and not this, but only a right to choose, in the event indicated, whether that support shall be secured by timbers resting on both walls of the vein, or by excavating the hanging-wall to a depth of eight feet from its face. Thus it aims to carve out a sort of future contingent right in each of two distinct parcels of land now held in fee simple, and to acquire the option of determining hereafter which of those rights it will eventually appropriate.

This is plainly going beyond any power conferred by the statute.

That a contingent estate already existing may be condemned under the law, I see no sufficient reason to dispute, for such a power seems to be necessary to enable the company, when an estate of that nature is outstanding, to acquire what the statute says it may acquire—a right to permanently maintain an existing road; but that is a very different thing from a power to create such a contingent interest in order to condemn it, to the end that the company may, in a possible event, construct a different road on other lands. Such a power is not expressed in the statute or necessarily implied by anything which is expressed, nor have we found any decision tending to uphold it under an ordinary grant of eminent domain. In our opinion, the language of the statute imports only the acquisition of present rights, and of whatever may be necessary to make those rights perpetual.

For these reasons the judgment of the supreme court must be affirmed.

For affirmance—THE CHANCELLOR, DIXON, KNAPP, REED, VAN SYCKEL, BROWN, CLEMENT, MCGREGOR, PATERSON, WHITAKER. 10.

For reversal, none.

When the foregoing case was decided by the supreme court, it said, per Dupue, J.: "I think it is clear that under the general railroad act, where the condemnation is of lands not already impressed with corporate franchises, the condemnation must be of lands, in the legal sense of that term, whereof the exclusive possession and use for the purposes for which they are taken will be transferred, and that any lesser interest in lands than the unqualified use and possession for the legitimate purposes of

RIGHT TO SUP-
PORT TRACKS ON
OTHER PROP-
ERTY.

CONTINGENT ES-
TATE. POWER
TO CREATE.

the company cannot be obtained by condemnation; and corporations organized under the act of 1869 can only take that which, and in the manner which, the legislature has prescribed in the general railroad act. Except in virtue of the special power granted by that act, such corporations have no power to take at all. They must take lands for their right of way with the qualification that they need not take the right to permanently use or occupy the surface of the earth above their tunnels.

The proceedings do not comply with the statute. In the first place, the company does not propose to take the lands described, in the legal sense of that term, nor the exclusive occupation and use of such lands. It proposes by this condemnation to acquire an interest in the lands and the possession and use of them in common with the owners, and to impose upon the owners obligations and duties in connection therewith—the obligation to give reasonable notice before they remove the ores from beneath the road-bed, and the duty, which the law will imply, that they shall exercise their right to remove ores with due regard to the company's rights in the premises. The statute affords no warrant for the acquisition of such a qualified right in lands, or the imposition of burdens and duties upon owners in connection therewith by process of condemnation. The statute only authorizes the taking of lands, and the occupation and use of lands, in the state and condition of lands in the legal sense of that term." *State v. Hibernia, etc., R. Co.*, 47 N. J. Law, 48.

Mode of Exercising Right of Eminent Domain.—The mode or method of exercising the right of eminent domain in the absence of any provision in the organic law regulating it is within the discretion of the legislature. The limitation is that it shall be exercised for a public purpose, with just compensation; and vesting the power of ascertaining it in a court and appraisers, is constitutional. It is not necessary that the owner shall have the right under the act to institute the proceeding to condemn the property, or that his right of action should be increased. And a prior occupation of the land without authority of law, even though it be a trespass, will not preclude the company from taking subsequent measures authorized by law to condemn the land for its use. *State v. Baker et al.*, 20 Florida, 616.

Conveyance of "Two Acres of Gravel"—**Description of Lands.**—A conveyance was made to a railroad company of the right of way through the grantor's lands, and "also two acres of gravel on said land nearest said railroad as at present located through said tract." *Held*, that such conveyance passes a freehold estate in the gravel, if words are used sufficient to identify the lands on which it is situated; but no words being used by which the two acres can be definitely ascertained, the instrument is inoperative as a conveyance, though a court of equity will enforce it, if fair and founded on a valuable consideration, as an agreement to convey. *Louisville, etc., R. Co., v. Boykin*, 76 Ala. 560.

SETZLER

v.

PENNSYLVANIA SCHUYLKILL VALLEY R. Co.

(*Advances Case, Pennsylvania. February 23, 1886.*)

The measure of compensation to be given to a land owner for the portion of his land taken by a railroad company for the construction of its tracks is the difference between what the property unaffected by the obstruction would have sold for at the time the injury was committed, and what it would have sold for as affected by the injury.

The ordinary risks to building upon the property, from fire which is not the result of negligence, is a matter proper to be considered by the jury in determining the extent to which the market value of the property has been depreciated.

But the possible damages which may result from the negligent or unskillful operation of the railroad cannot be taken into consideration in fixing the land owner's compensation.

ERROR to the Common Pleas of Chester County, to review a judgment assessing damages to property, resulting from the location of a railroad. Reversed.

Webster K. Setzler is the owner of a farm in Chester County. The Pennsylvania Schuylkill Valley R. passed through his property. Upon petition of Setzler a jury of view was appointed and they assessed his damages at \$3800, estimating for the necessity of removing the barn and hog-house, but considering that the dwelling-house might remain although within one foot of the railroad and without a kitchen. From this assessment petitioner appealed to the Court of Common Pleas. That court delivered the following charge to the jury:

FUTHEY, J.—The plaintiff in this case, Webster K. Setzler, is the owner of a farm in Chester County containing seventy-six acres, and the railroad of the defendants, the Pennsylvania Schuylkill Valley R. Co., now in process of construction, passes through his property.

The issue you are trying was framed for the purpose of determining the amount of damages the plaintiff has sustained, by the taking of a portion of his land for the purposes of the railroad, and the injury thereby occasioned to his dwelling-house and other buildings.

You have examined the property and have seen the manner in which the railroad is constructed upon the land, its proximity to the buildings, and other matters to which your attention was directed at the time of your view.

The rule laid down by the supreme court for the determination of the question involved in this case is, that it is the duty of the

jury to ascertain the value of the property before the railroad was projected through it, then the depreciation it has suffered in the market by reason of the construction of the railroad, and the difference between the two amounts constitutes the amount of damages to be awarded to the plaintiff.

In this case you will therefore ascertain what amount the plaintiff could have obtained for his property in a fair market, either at a private or public sale, before the construction of the railroad by the defendants, and what he can now obtain for it, the difference being the amount of the injury he has sustained.

The testimony of a large number of witnesses has been given relating to the value of the property, both before and after the construction of the railroad. It is your duty to ascertain these values from all the facts in the case, and not alone from the testimony of the witnesses, which is simply one species of evidence for your consideration.

Your attention has been called to the various disadvantages the plaintiff will suffer when the road is in active running operation, and among these are the shape in which his land has been left, by being cut off from the portion taken by the railroad, the necessity created for the erection of a bridge, the building and maintenance of fences, the addition of a tin roof to the spring-house to guard against fire by sparks from passing locomotives, and the injury caused to a spring of water.

The witnesses have testified that 269 additional panels of fencing will be required, at a considerable cost to the plaintiff, and that the value of the garden and a portion of the orchard has been impaired to some extent. These are all matters to be considered by you in determining the question of damages.

The principal items of damage the plaintiff claims have relation to the close proximity of the railroad to his dwelling, barn and hog-house. It appears that it runs within a short distance of the barn, the outer line of the track being about ten feet from the corner of the straw-house, which projects outward from the barn, passing through the kitchen, taking away a portion of the yard and approaching within one foot of the corner of the main portion of his dwelling.

In this connection you will determine whether the railroad runs so close to the buildings of the plaintiff as to render them practically useless for the purposes of his property, and whether they should be permitted to remain in their present position.

If you are of the opinion that a prudent man can safely occupy the buildings, and that there is no occasion to remove them, then the cost of their removal will not be considered by you, although the inconvenience the plaintiff may suffer, by reason of the proximity of the railroad, is a proper matter for consideration in ascertaining the extent of the depreciation of the property in the market.

The law is clear, however, if you determine that ordinary prudence will render it safe for the buildings to remain in their present position, that no damages can be given by way of anticipation of any injury the plaintiff may hereafter suffer by fire, either carelessly occasioned through the negligence of the defendants, or inadvertently, in the proper management of their trains; and it is therefore not an element which you are to consider.

The only question you are to determine, if you decide that a prudent man can safely occupy the buildings as they are now located, is the damage the plaintiff has sustained by the construction of the railroad, the taking of his land and the expense he will incur in restoring his property to its former condition.

If you reach the conclusion that the proximity of the railroad to the buildings places them in such a position as to render them unsafe for occupation by a prudent man, it is an element that enters into the question of the depreciation of the property in the market, and you will then take into consideration the expense the plaintiff will incur by removing them to another point on his property.

In determining this question, if you conclude that it will be safe for the buildings to remain as they now are, you will consider the testimony that has been given in relation to their possible alteration, and the expense of making the necessary alterations will form an item in the plaintiff's claim for damages.

If you find that it will be impracticable to make these alterations, and that the proximity of the railroad renders it unsafe for any prudent man to occupy the dwelling-house, or to use the other buildings as they are now located, you will consider the cost of their removal to other points, and allow him in your verdict such an amount as will represent the depreciation in the value of his property in that respect.

These are the principal matters involved in the determination of the case to which it is necessary I should particularly call your attention. You have heard the testimony given by the various witnesses, as to the manner in which the railroad runs through the property; the estimates they have placed upon the quantity and value of the land taken; the cost of additional fencing, and the other items forming the plaintiff's claim for damages.

It is your duty to consider all the testimony relating to these items, in order to arrive at a proper conclusion as to the depreciation in the market value of the property; and upon whatever amount you may determine to be the damage he has sustained you will compute interest from the date of the taking of his land, to wit, May 1, 1883.

In conclusion, I desire to remind you that both the parties to this issue are equal before the law. You are a jury selected by both of them to determine the matter at issue, and you should not

be influenced in rendering your verdict by the fact that the plaintiff is an individual and the defendants are a corporation, for both have their rights, and whatever those rights may be, it is your duty to accord to them.

I have been requested by the counsel for the plaintiff to instruct you upon the following points, viz. :

1. "A landowner is obliged to run the risk of fire necessarily following the proper and lawful use of locomotives; and, in the event of such fire, no recovery can be had for losses resulting therefrom."

I have referred to the principle of law stated in this point, and have said that if you conclude it is safe for the buildings to remain in their present position, any possible loss that may hereafter accrue to the plaintiff, by fire or other cause, in the management of the railroad, cannot be taken into consideration in determining the question of damages. If, however, you determine that it is necessary to remove the buildings to some other point, and that the proximity of the railroad renders them unsafe for occupancy by a prudent man, the cost of their removal is a proper element to be considered in estimating the amount of damages the plaintiff has sustained.

2. "If the jury believe that the railroad is located so near the buildings of the plaintiff as to render them practically useless, damages may and ought to be given for their loss."

I have previously answered this point, by saying that if the railroad has been constructed so close to the buildings that a prudent man would not consider it safe to occupy them, the cost of their removal to some other point on the property is a proper element of loss to be taken into consideration in determining the depreciation in the market value of the property.

3. "If the jury believe that if from the proximity of the road to the buildings, the danger of fire is such that no man of common prudence would use them, but would be compelled to provide himself with buildings elsewhere, the jury should consider this in estimating the damages."

I have already said all that I deem necessary in regard to this point.

In framing your verdict, as one of the questions to be determined is whether it is necessary to remove the buildings on the property to some other point, you will in the first place render a verdict for whatever amount of damages you may conclude the plaintiff has sustained, and will then say whether or not in your opinion the present position of the buildings is unsafe for occupancy by a prudent man. If you reach the conclusion that the buildings are in an unsafe position, you will state that fact in your verdict, in addition to finding the amount of damages you may determine the plaintiff has sustained.

The jury returned a verdict of \$3143.71, estimating that it would be necessary to remove the dwelling-house, barn, and hog-house; and from the judgment entered thereon plaintiff appealed.

William M. Hayes for plaintiff in error.

Thomas S. Butler and *R. E. Monaghan* for defendant in error.

STERRETT, J.—The charge of the learned Judge, in relation to the proper measure of damages in cases like the present is, in the main, correct. In accordance with the long-recognized rule, he instructed the jury “to ascertain the value of the property before the railroad was projected through it; then the depreciation it has suffered in the market by reason of the construction of the railroad, and the difference between the two amounts constitutes the amount of damages to be awarded to the plaintiff;” and they should, “therefore, ascertain what amount the plaintiff could have obtained for his property in a fair market, either at public or private sale, before the construction of the railroad by the defendant, and what he can now obtain for it; the difference being the amount of the injury he has sustained.” He also instructed the jury to allow interest on the damages so found by them, from the time the plaintiff’s property was taken. To these instructions there can be no just ground of complaint. But it is contended by plaintiff that, in the application of the general rule above stated, at least one material element of depreciation was afterwards excluded from the consideration of the jury. It was conceded that the location and construction of the road through plaintiff’s farm had lessened its market value. In addition to the land actually taken for roadbed, nearly two and one fifth acres, the elements of depreciation, in regard to which testimony was given, were: 1, the ordinary risk of fire, involving injury to fences, crops, etc., necessarily incident to the proper and legitimate use of locomotives in operating the road; 2, the close proximity of the road to the farm buildings, rendering them unsafe for occupancy and thus necessitating their removal and reconstruction, as the jury has specially found; 3, the necessity for making and maintaining additional fence; 4, the inconvenience and expense of access to a portion of the farm cut off by the railroad, and also some minor matters in regard to which there was little or no controversy. The principal contention, it is true, was in regard to the necessity of removing the buildings, and the cost thereof; but there was no abandonment of either of the other elements of depreciation in support of which testimony was introduced, and especially that in relation to the ordinary risk of fire not resulting from negligence. That this is a matter proper to be considered by the jury, in determining the extent to which the market value of the property has been depreciated, cannot be doubted.

INSTRUCTION AS
TO PROPER
MEASURE OF
DAMAGES.

ELEMENTS OF
DEPRECIATION.

The principles governing the assessment of damages to the owner of lands through which a railroad has been located are clearly and concisely stated by our brother Clark in *Pittsb., Bradford & Buffalo R. Co. v. McCloskey*, 1 Cent. Rep. 619; s. c., 16 W. N. C. 561. After quoting the general rule announced by Chief Justice Gibson in *Schuylkill Navigation Co. v. Thoburn*, 7 S. & R. 411, viz., that the true measure of compensation is the difference between what the property, unaffected by the obstruction, would have sold for at the time the injury was committed and what it would have sold for as affected by the injury, he proceeds to say: "The adjustment of this difference involves, in all cases, a fair and just comparison of the advantages and disadvantages resulting from the opening and operation of the road and the construction of its works; but the advantages to be considered are such only as are special and the disadvantages such as are actual. The general appreciation of property in the neighborhood, consequent to the projected construction of the road, cannot enter into the calculation; to this the landowner whose lands have been taken is as fairly entitled as is his neighbor whose possession and enjoyment have not been disturbed. The general increase of value, resulting from the growth of public improvements, railroads, canals, and highways, accrues to the public benefit, and in the computation of damages the landowner cannot be charged therewith. The question, in each case, is whether or not the special facilities afforded by the improvement have advanced the market value of the property beyond the mere general appreciation of property in the neighborhood. . . . So, also, on the other hand, the disadvantages must be actual, not speculative; they must be such as substantially affect the present market value of the land. . . . Merely speculative damages cannot be allowed. The inconvenience arising from a division of the property, or from increased difficulty of access; the burden of increased fencing; the ordinary danger from accidental fires to fences, fields, or farm buildings, not resulting from negligence; and generally all such matters as, owing to the particular location of the road, may affect the convenient use and future enjoyment of the property, are proper matters for consideration; but they are to be considered in comparison with the advantages only as they affect the market value of the land."

TRUE MEASURE
OF COMPEN-
SATION.

APPRECIATION
OF PROPERTY IN
NEIGHBORHOOD.

It will be observed that damages which may possibly result from negligent or unskilful operation of a railroad are thus wholly excluded from consideration in such proceedings as this. Such damages may never be sustained; and, if they do occur, the party aggrieved may have an independent remedy therefor. It is only ordinary dangers or risks not resulting from negligence that can be taken into consideration in

DAMAGES FROM
UNSKILFUL OP-
ERATION OF
ROAD.

assessing damages to the landowner; and even those dangers or risks are not to be regarded except in so far as they affect the market value of the land. It follows, therefore, that the landowner is obliged to assume the ordinary risk of fire necessarily incident to the proper and lawful use of locomotives; and in the event of loss resulting therefrom, no recovery can be had therefor. Hence plaintiff's first point to that effect should have been affirmed. The risk therein mentioned is clearly an element of depreciation; and if its effect on the market value of the property is not taken into consideration in estimating the damages he has sustained, it can never be considered. The answer of the learned judge is not responsive to the point; and in any aspect it is misleading and erroneous, in that it conveys the idea that such risks cannot be taken into consideration by the jury in determining the question of damages. The second and fifth specifications of error are sustained; and, in so far as portions of the charge embraced in the first, third, and fourth specifications are calculated to convey the same idea, they are also sustained. There is no merit in the sixth specification.

Judgment reversed, and a *venire facias de novo* awarded.

Liability to Fire as an Element of Damages.—See *Kansas City, etc., R. Co. v. Kregelo*, 20 Am. & Eng. R. R. Cas. 241; *Lance v. Chicago, etc., R. Co.*, 5 Ib. 295; *Wooster v. Sugar Valley, etc., R. Co.*, 10 Ib. 499.

HENDRY

v.

TRINITY AND SABINE R. Co.

(*Advance Case, Texas. March 20, 1886.*)

In a condemnation proceeding the damages awarded may include the value of any houses or property placed on the land by the railroad without the owner's consent, which can be used as it stands, and which has become a fixture on the land.

APPEAL from Polk County.

Hill & Corry for appellant.

J. M. Crosson for appellee.

HURT, J.—Appellant sold the appellee 100 feet right of way over his homestead tract of land, whereupon appellee then built its roadbed in the centre of its right of way. Afterward, in the year 1882, the appellee, without appellant's consent, entered upon appellant's adjacent land and built thereon a section-house. When the land was built the appellee had knowledge

that the land upon which it was built belonged to appellant, and was not a part of the 100 feet right of way previously purchased. In 1884, about two years after this house was built, appellant instituted an action of forcible entry and detainer to oust appellee from the possession of said premises, and then, and not before, appellee instituted this proceeding to condemn the land whereon the house had been built.

Now, it is urged by appellant that under the facts of this case the measure of damages should include the value of this MEASURE OF DAMAGES—SECTION-HOUSE. section-house, thus erected by appellee upon land of appellant without his consent, etc.

In the case of *Texas & Pacific R. Co. v. Hays*, 5 Texas Law Review, 771, we held that the improvements such as roadbeds, cross-ties and rails placed by the company upon the right of way do not pass as fixtures with the land; that such improvements are not to be estimated as damages in condemnation of the right of way.

The general rule is that fixtures annexed to the freehold become part of the realty, but to this rule there are exceptions; FIXTURES. as, for instance, when there is a manifest intention to use the fixtures in some employment distinct from that of the occupant of the land. *Bouvier's Law Dic.*

In the case of *Railroad v. Hays*, *supra*, this distinction is clearly recognized. In that case Hayes could not use the cross-ties and rails in any employment connected with his use of the freehold. For them to be used by him they would first have to be detached from the realty and converted into personal property, etc. This is not so in the case in hand. Hendry, without disturbing the house, could use it—use it as it stands, fixed and as a part of the realty, and hence one of the reasons controlling the decision in the *Hays* case is wanting in this, and we are not disposed to extend the rule further than it has gone in the *Hayes* case.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Value of Property placed on Land by Railroad as an Element of Damages.

—See *Cal. So. R. Co. v. Southern Pac. R. Co.*, 20 Am. & Eng. R. R. Cas. 809; *Toledo, etc., R. Co. v. Dunlap*, 5 Ib. 378.

CHICAGO AND EVANSTON R. CO.

v.

BLAKE.

(Advance Case, Illinois. January 22, 1886.)

In a condemnation proceeding to acquire land for a railroad, an objection that witnesses as to value failed to show knowledge based upon actual sales in the locality goes to the weight of the evidence, and not to its competency.

It is not error to permit the owner of the premises sought to be condemned to exhibit to the jury plans of a building he had contemplated erecting thereon, when expressly limited to showing the uses to which the premises are adapted and the capabilities of the property.

If there is a difference in the value of the land sought to be condemned, when considered as a part of the lot from which it is to be taken, and when considered as a distinct and separate property, the higher value should control.

Benefits which may accrue to property in common with all other property along the line of the proposed railroad by reason of the construction of the road cannot be set off against, nor deducted from, a just compensation for the value of the property taken.

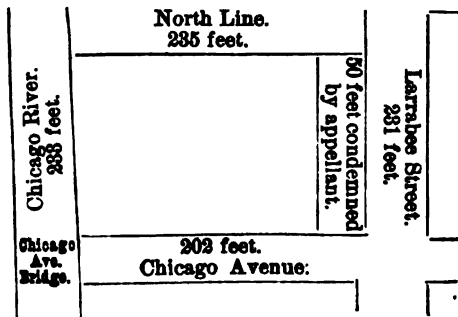
APPEAL from the Cook County Circuit Court. **Affirmed.**

The case is stated in the opinion.

E. Walker for appellant.

Robert Hervey and *C. Stuart Beattie* for appellee.

MULKEY, Ch. J.—This proceeding was commenced in the
FACTS. County Court of Cook County by the Chicago & Evanston R. Co. to condemn, for railroad purposes, a strip of land fifty feet wide off the east side of lot six, block ninety-five, Elston's Addition to the City of Chicago. The lot of which the fifty feet condemned was a part is bounded by the adjoining lot on the north, Chicago Avenue on the south, Larrabee Street on the east, and by the Chicago River on the west. The following diagram shows the situation of the property:



Barnum Blake, the appellee, is owner of the entire lot. The jury, after hearing the testimony of many witnesses on both sides, and making a personal examination of the premises, awarded as compensation the sum of \$39,000, upon which award the court entered judgment, and the petitioner appealed to this court.

With respect to the claim the damages are excessive—we see no cause for reversing the judgment on that ground. EXCESSIVE DAMAGES. The witnesses, as generally happens in this class of cases, widely differed, both as to the value of the land taken and the extent of the damage to the remaining portion of the lot. Very nearly all of them on both sides were real-estate agents and dealers in real property, living and doing business in the city; and most, it not all, swore they were acquainted with the value of property in that locality. Had the jury disregarded their own examination of the property and accepted without qualification the opinions and theory of the witnesses for the respondent, the compensation and damages awarded would have been increased by thousands of dollars. On the other hand, had they simply accepted the theory and opinions of the petitioner's witnesses, the amount found by them would have been greatly diminished.

So, it is clear the jury must have exercised their own judgment in the matter. In such a diversity of opinion and conflict of testimony, we are aware of no rule or principle that would authorize us to interpose, on the ground the evidence does not support the verdict, especially as it may reasonably be supposed their verdict is based, at least to some extent, upon their own examination of the property.

The point is made that the court erred in permitting respondent's witnesses to testify at all, for the alleged reason they did not, in a preliminary examination before the court, furnish satisfactory evidence of their knowledge of the market INCOMPETENCY OF WITNESSES. value of property in that locality, as based on actual sales.

This point is clearly not well taken. Even admitting the court, in an extreme case, would have the right to exclude a witness on the ground of incompetence where he had had no opportunities at all to obtain such information as would enable him to form an intelligent opinion on the question of value, about which we express no opinion, there was clearly no ground for the application of such a rule in this case. So far as this case is concerned, whatever there is in the objection goes to the value of the testimony rather than to its competency. It is the uniform practice of the courts to admit such evidence, and it is stated in Lawson's work on Opinion and Expert Evidence that there is but one State in the Union where such evidence is not received. It would cer-

tainly be a startling announcement to go out to the profession that this court had reversed a judgment in a condemnation case in Chicago because the trial court had permitted a number of resident real-estate dealers to give their opinions as to the value of the land taken, without requiring them to first satisfy the court that their opinions on the subject were based upon their knowledge of actual sales in that locality. While such knowledge is always desirable, it is by no means a test of a witness's competency. Nor is it in many cases the chief element in determining the weight or value of the witness's testimony when given.

The uses and capabilities of a particular property; the prices at which like property in the neighborhood is held or offered; knowledge or observation of the growth and development of towns and cities; a general knowledge of trade and business and of the commercial advantages or prospects of the place where the property is situated, are all matters more or less taken into account by the intelligent witness in forming his opinion as to the value of a particular piece of property.

It is also urged that the court erred in permitting the respondent to exhibit before the jury the plans of a certain structure he had contemplated, for a number of years past, erecting on the premises. Whether evidence of this kind is proper or improper depends entirely upon the purpose for which it is offered, and to which it is limited by the court. If the object of such evidence is to enhance the damages by showing such a structure would be a profitable investment, the testimony would clearly be inadmissible. If, on the other hand, it is offered merely as an illustration of one of the uses to which the property is adapted, or, in other words, by way of showing the capabilities of the property, and it is expressly limited by the court to such object, as was the case here, there will be no error in admitting it. The practice, however, of introducing such evidence should not be encouraged, as there is generally more or less danger of its being misunderstood by the jury. But the purpose of the testimony in this case was so clearly and repeatedly stated by the court that it is almost impossible there could have been any misapprehension in respect to it, and consequently there was no error in admitting it.

Respondent asked the court to give the jury the following instruction:

"Third, if the jury find from the evidence that the part of the lot proposed to be taken in this case is of greater value when considered as a part of the entire lot than it would be as a separate and distinct piece of property, entirely disconnected from the residue of the lot, then the jury, in order to make the owner of the lot just compensation for the part

PLANS OF BUILD-
ING AS EVIDENCE.

VALUE OF LOT
AS ENTIRETY.

taken, may allow to him the fair cash or market value of the part of the lot taken, when considered in its relations to and as a part of the entire lot, and not simply what may appear to be its value as a separate and distinct piece of property, entirely disconnected from the residue of the lot;” which the court refused to do, but modified the same by adding the following:

“But in the event of the jury giving a greater value for the part of the lot taken, by reason of its being a part of an entire lot, then, in assessing damages, if any, the residue of the lot not taken, the jury should not estimate that greater value given to the part of the lot taken by reason of its connection with the balance of the lot;” and then gave the instruction as modified to the jury, to the giving of which the petitioner excepted. The instruction as originally drawn contained a clear, accurate statement of the law, and should have been given as asked. It, in effect, told the jury that if there was a difference in the value of the land sought to be condemned when considered as a part of the lot from which it was taken, and when considered as a distinct and separate property, the higher or greater value should control or be allowed. So far, we think, there can be no question as to the correctness of the instruction. If, therefore, there is any error in the instruction as given, it arises from the modification of it by the court. As we understand the modification, it tells the jury, in effect, that in assessing the damages to the part of the lot not taken, if any such damages are allowed, they are not to include in the assessment the difference between the higher and the lower value of the part of the lot taken as contemplated by the instruction, should any such difference exist. Or, more plainly yet, it tells the jury that in assessing the damages they should not include any part of the compensation allowed for the land actually taken. While we think this was unnecessary, and was doubtless the result of extraordinary caution on the part of the trial judge, yet we see nothing in it of which the appellant has a right to complain, as the modification was clearly in its interest. If the objection came from the other side there might be some force in the claim that it was “confusing.”

The sixth instruction for respondents is also complained of. It is as follows:

“Sixth. Under the law of this State, no benefits or advantages which may accrue to lands or property in common with all other property along the line of the proposed railroad, by reason of the construction and operation of such railroad, can be lawfully set off against or deducted from a just compensation for the value of the property taken and damaged by such proposed railroad, as the same may appear from the evidence.”

BENEFITS
PROPERTY
COMMON. OF
IN

In *Page v. C. M. & St. P. R. Co.*, 70 Ill. 324, an instruction sub-

stantially the same as this was approved. The only objection urged to it is that it is not expressly limited to the value of the property taken. We think this is hypercritical and affords no grounds for a reversal.

Even conceding the instruction vicious in the respect claimed, which we do not, appellant's fourth instruction clearly covers it.

Judgment affirmed.

Prospective Use of Land—Consideration of in assessing Damages.—See *Little Rock, etc., R. Co. v. McGehee*, 20 Am. & Eng. R. R. Cas. 82; *Washburn v. Milwaukee, etc., R. Co.*, 20 Ib. 225; *Scott v. Indianapolis, etc., R. Co.*, 10 Am. & Eng. R. R. Cas. 189; *Sherman v. St. Paul, etc., R. Co.*, 10 Ib. 193; *Everett v. Union Pacific R. Co.*, 10 Ib. 204; *St. Louis, etc., R. Co. v. Kirby*, 10 Ib. 214.

Benefits accruing to Remainder of Property as Set-off.—See *McReynolds v. Burlington, etc., R. Co.*, 14 Am. & Eng. R. R. Cas. 172; *St. Louis, etc., R. Co. v. Anderson*, 17 Ib. 97; *Smith v. Coomba*, 20 Ib. 209; *Grafton, etc., R. Co. v. Foreman*, 20 Ib. 215; *Washburn v. Milwaukee, etc., R. Co.*, 20 Ib. 225.

Measure of Damages for Unlawful Entry on Alley—Injury not Permanent.—Plaintiff brought an action for damages alleged to have accrued to him as owner of certain business lots, across which ran a public alley, (affording valuable access to the same), in consequence of the defendant's alleged wrongful and unlawful entry upon the alley against plaintiff's protest, and constructing and maintaining along the entire length thereof a line of railway track, and running cars thereon, so as to render any other mode of travel along the alley difficult and dangerous, and at times nearly impossible and to damage and depreciate the value, use, enjoyment, and occupation of plaintiff's property. *Held*, that the proper measure of actual damages is the difference between the fair rental value of the plaintiff's property with the railway track constructed, maintained, and used upon it, and its rental value without such track. Such damages would, however, accrue to plaintiff only while he owned the property affected, and not as to any part of it of which his lessees were in possession during all the time between defendant's entry upon the alley and plaintiff's sale of the property. *Carli v. Union Depot, etc., R. & T. Co.*, 32 Minn. 101.

Damages for Increased Difficulty of Communication between Parts of a Tract.—Defendant constructed its line of road on a line and course through plaintiff's land, which required the raising of the railroad-bed above the ordinary level of the adjacent land. The embankments thus formed constituted an obstacle to the plaintiff's direct passage across the road to the tract beyond. After condemnation and assessment of damages, plaintiff brought suit for damages, resulting from increased difficulty of communication between the parts of the tract. *Held*, that damages resulting from such a source are construed to have been included in the assessment of damages in proceedings condemning the land for the use of the road. Such an assessment of damages embraces all past, present, and future damage which the improvement may thereafter reasonably produce. *International & G. N. R. Co. v. Pape*, 62 Tex. 813.

Damages to Land through which Road is built accrue to Owner and not to Subsequent Grantee.—In 1855 Martha Brittingham owned a quarter section of land, and continued to own and possess it until August, 1882. In 1869 a strip of land through said section was taken by the Indiana, Crawfordsville & Danville R. Co., which built the road now operated by the

Indiana, B. & W. R. Co. The road was built and operated with the knowledge of the owner of the land, and without objection. In August, 1882, Martha Brittingham and her husband conveyed to the plaintiff by warranty deed the whole of said quarter-section, this deed being his only source of title. Plaintiff then conveyed by warranty deed all of said quarter-section except the strip of land aforesaid. The plaintiff never owned any land adjoining said quarter-section. The plaintiff then demanded a writ to assess the value of the strip taken by the railroad company, and the damages to the residue of the said quarter-section. The jury assessed the damages at \$880, \$280 as the value of the strip, and \$600 as damages for the injury to the residue of the quarter-section. On appeal to the Supreme Court it was held that when the railroad took possession and built its road upon the lands of another without appropriation or condemnation, as the statute provided, the damages then accrued to the owner, and a subsequent conveyance of the whole tract gave the grantee no right to any damages. *Indiana, etc., R. Co. v. Allen*, 100 Ind. 409.

Damages to Land covered by Public Road.—A master was directed to ascertain and report the value of certain lands taken by a railroad company for its right of way, and the consequent damage to the owner's adjacent lands as of the time when the company took the land. *Held*, that the land covered by a public road, which was laid out through the land taken by the company, after the company had taken it, should not be excepted. *New York, etc., R. Co. v. Heirs of Stanley*, 39 N. J. Eq. 361.

Value of Improvements placed on Public Land by Railroad Company cannot be given as Damages to Subsequent Patentee.—The company built its road over a parcel of land belonging to the United States. Appellant afterwards entered the land and obtained the government title by patent for it. The company afterwards instituted proceedings to condemn so much of the land as it was using. *Held*, that the patentee could not have the value of the land estimated according to the improvement caused by the location of the property of the company. *Denver & R. G. R. Co. v. Stancliff* (Utah, June, 1885), 7 Pac. Repr. 530.

Elements of Damage, Noise, Smoke, etc., depreciating Rental Value.—In the trial for the assessment of damages plaintiff was permitted to show how the occupants of the property were annoyed by the noise, escape of fire from the engines, etc., by the operation of the road. The court admitted the evidence on the ground that all the facts attending the use and operation of the railroad were proper to be given in evidence as bearing upon the rental value of the property. *Held*, that the ruling of the court was correct; that it was proper to put the jury in possession of all the facts attendant upon the occupation of the alley by the railroad. *Wilson v. Des Moines, etc., R. Co.* (Iowa, Dec., 1885), 25 N. W. Rep. 754.

Assessment of Damages—Estimating Value of Easement in Alley.—The defendant owned a tract of land, divided it into lots, opened an alley through it, and sold lots on the alley, but did not, in her deeds to the purchasers, expressly reserve the right to have the alley revert to her when it ceased to be used as an alley, if such use should cease. A railroad company owned all the land on one side of such an alley, and sought to condemn the land on the opposite side thereof. *Held*, that the owners of such land, in estimating the value of the lot, had a right to claim compensation for the easement in the alley and the right to a half-interest therein when it ceased to be used as such. *Cincinnati & Ga. R. Co. v. Mims*, 71 Ga. 5.

Same: Right of Way only Easement.—The defendant requested the trial court to charge the jury as follows: "The defendant railway company, in the case at bar, by proceedings in condemnation acquires only an easement, as it is sometimes called; or, in other words, the right only to use the lands taken for the purpose of constructing and operating its line of railroad, but at

the same time leaves the plaintiff or the owner of the premises the right to cross and recross the line at pleasure for the purpose of going from one part to any other part of his premises, and requires the railroad company, when demanded so to do by the owner, to construct and maintain one or more crossings over or under, or at grade upon the premises or farm in question, so as reasonably to accommodate such owner." The court held that the instruction was properly refused, as it assumed that the owner had a full right to cross and recross the right of way superior to the right of the defendant to use it for the purposes of operating a railroad upon it, and further say: "That a railroad right of way is an easement, and that the fee remains in the owner of the land condemned for railway purposes, are correct as abstract propositions of law; but they have no application in proceedings to condemn land for right of way for a railroad except when it is made to appear that the fee burdened with the easement is of some determinative value. The theory is that the easement is to be a perpetual right, and it is the usual practice to introduce evidence in these cases showing the full value of the land actually taken as an item in the estimate of the damages sustained by the property-owner. This is allowed upon the theory that any interest he has in the land actually appropriated is of no value. This court has held that it is not error to refuse to instruct the jury in such cases that the fee title remains in the owner. [*Cummins v. Des Moines & St. L. R. Co.*, 17 Am. & Eng. R. R. Cas. 86; *Hollingsworth v. Same*, 17 Am. & Eng. R. R. Cas. 118.] And the jury are not warranted to estimate the compensation to the owner upon the theory that at some time in the future the land appropriated for the right of way may cease to be used for railway purposes and revert to the owner." *Clayton v. Chicago, etc., R. Co.* (Iowa, Oct., 1885), 25 N. W. Rep. 150.]

Right to Jury Trial in Assessment of Damages.—The right to a trial by jury is a substantial right that should not be trifled with; and where a jury is demanded, and refused, to assess damages in an action by a railroad company to appropriate land, or an opportunity to demand one denied, and substantial injustice is thereby done, the proceedings will be set aside. *Port Huron & N. W. R. Co. v. Collinan*, 22 N. W. Rep. 717.

We also append a few points recently decided concerning procedure in condemnation suits.

Appeals in Maine in Condemnation Suits.—When an appeal is taken and prosecuted, under the statutes of Maine, from the decision of the county commissioners in locating and laying out a way, any person aggrieved at the commissioners' estimate of damages may file notice of appeal therefrom at any time within sixty days after final decision in favor of such way. *Boston & M. R. Co. v. County Commissioners of York Co.* (Maine, 1886), 1 New England Repr. 785.

Procedure in Condemnation Suits.—Court will not set aside Inquest.—Where there is any evidence whatever to support the findings, the court will not set aside an inquest on motion of defendant. He should appear on the trial, make the proper objections, and take exception to adverse rulings, and appeal from the judgment, or take a new trial under the statute, upon payment of costs. *Greenleaf et al. v. Brooklyn, etc., R. Co.* (New York, March, 1886), 5 N. E. Repr. 786.

Court will not determine Question of Interference with Adjacent Lands.—In a proceeding by a railroad company to acquire specific lands under chap. 140, Laws of New York, 1850, the court will not determine a question as to the interference with other lands adjacent thereto. *In re New York, etc., R. Co.* (New York, 1886), 4 Eastern Rep. 800.

Amendments to Instrument of Appropriation.—The instrument of appropriation of land for right of way in condemnation proceedings may, on cause shown, be amended by adding stipulations thereto as to fences and

crossings, calculated to reduce consequential damages, after the report of the appraisers has been filed, and issues joined on exceptions thereto. *Chicago, etc., R. Co. v. Jones*, 6 N. E. Repr. 8. And a decision of a trial court allowing or refusing leave to amend a pleading may be reviewed by supreme court. *Chicago, etc., R. Co. v. Jones*, 6 N. E. Repr. 8.

Appeal—Time of Filing—Notice of Appeal.—The requirements of Rev. St. of Maine, c. 18, § 5, relating to the time within which an appeal is to be taken by any person aggrieved at the estimate of damages by the county commissioners, are applicable only when no appeal on location has been taken. *Boston, etc., R. Co. v. Co. Com'rs of York Co. (Maine, March, 1886)*, 3 Atlantic Repr. 273.

The exception that the decision in the case was not supported by the evidence cannot be entertained on an appeal from the final judgment when the exception was not taken within 60 days from the rendition of such judgment. *California Code of Civil Proc. 939; Weyle v. Sonoma Val. R. Co.*, 10 Pac. Repr. 510.

Where an appeal on location is taken and prosecuted as provided in Rev. St. of Maine, c. 18, §§ 48, 49, the appellant on damages may file notice of appeal within 60 days after final decision in favor of such way, and the phrase "within the time limited," in Rev. St. of Maine, c. 18, § 8, refers, when an appeal on location has been taken, to the time limited in section 47 of that chapter. *Boston, etc., R. Co. v. Co. Comm'rs of York Co.*, 2 Atlantic Repr. 273.

The object of a notice of appeal is to impart the requisite information to the opposite party of his opponent's intention to appeal, and what specific judgment or order is appealed from; and if the notice is sufficiently explicit in these particulars, it should be declared sufficient. But a mere clerical error as to the date of the judgment will not of itself mar the sufficiency of a notice of appeal. *Weyle v. Sonoma Val. R. Co.*, (California, 1886), 10 Pac. Repr. 510.

On appeal to the circuit court under Rev. St. of Indiana, 1881, § 3907, from the assessment of damages made by the appraisers, by filing exceptions to their award, after the compensation which should be allowed has been ascertained, the only remaining thing for the court to do is to render judgment of recovery against the railroad company for the amount of compensation thus ascertained to be due for the land appropriated; and a judgment that contingently restrains and enjoins the railway company from using or occupying the land in controversy as a means of enforcing the payment of the amount found due is erroneous. *Chicago, etc., R. Co. v. Jones (Indiana, 1886)*, 6 N. E. Repr. 8.

PITTSBURG, CHARTIERS AND YOUGHIOGHENY R. Co.

v.

MOSES.

(*Advances Case, Pennsylvania. January 4, 1886.*)

Where a railroad company has occupied a part of a public road, and made a cut across it, and a new road has been constructed, it is the duty of the company to erect and maintain for a reasonable time a proper barrier to prevent travellers from falling into the cut.

J. G. MacConnell for plaintiff in error.

D. T. Watson for defendant in error.

GREEN, J.—It seems to us the learned court below defined with great care and perfect accuracy the limitations of the defendant's liability. The company had constructed a new road to take the place of

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CHARGE TO THE JURY. the cut across the old road. The learned judge charged the jury that, if the defendant made a new road, it was their duty to erect proper barriers to protect persons from falling into the cut, and to maintain them for a reasonable time after the new road was finished. It seems to us this is a correct statement of law applicable to such a case. Certainly, in the first instance, this duty rested upon the company. When the cut across the old road was made and the new road was being constructed, it was the undoubted duty of the defendant to erect and maintain the proper guards. The jurisdiction of the supervisors would not attach at any time earlier than the completion of the new road and notice to them to that effect.

In view of the fact that it is a public road that has been changed, and that very many persons who do not necessarily know of the change may have occasion to pass that way, it is proper that the duty of maintaining the barriers to protect travellers from falling into the cut should rest upon the persons who have made the cut for a reasonable time after the completion of the substituted road. Nor can we say that a period of six weeks is an unreasonable time for the continuance of that duty. It was a very simple matter to erect such barriers as would be an ample protection to travellers while the change was being made, and the duty of subsequent protection would be discharged by the mere continuance of such barriers. Some time must necessarily elapse before the general public would become acquainted with the change, and it would be perfectly natural for a traveller, know-

ing the course of the old road, and not knowing of the new one, to take the old road at the point where the new one diverged, unless the passage of the old one was blocked by suitable obstructions. In such circumstances the ordinary authorities, to the effect that a man is not bound to protect excavations on his own land from accidents to trespassers, are not applicable. The case of *Township of Asten v. McClure*, 102 Pa. St. 323, is not in point. There only a part of the width of the old road was occupied for the railroad, and the supervisors permitted the remaining part, reduced to a very narrow road, to be used by the public without protecting the precipitous side by a railing or other safeguard. This was negligence in the township. Here a new road was substituted and the old one no longer used, and it may be questioned whether the duty of shutting off access to the old road at the point of divergence does not permanently reside with the defendant, since the old road no longer comes within the jurisdiction of the supervisors. Certainly that duty continued long enough to enable the travelling public to become acquainted with the change. In *Whart. Neg.* (section 819) it is said: "When a railroad company is authorized by its charter to divert the location of a highway, when this is necessary in the construction of its road, the right must be exercised with due regard to the public safety; and the company will be liable for injuries sustained by travellers on the highway by reason of its negligence in not erecting proper barriers to guard them, where such travellers are not in fault themselves." In *Potter v. Bunnell*, 20 Ohio St. 150, it is said: "In regard to the exercise of admitted rights, the rule is briefly stated in *Vesey v. R. Co.*, 49 Me. 119, viz.: 'The right to make the cut did not give the right to it do without due regard to the public safety, and that required that all proper guards should be erected and continued whenever there was danger of injury to any person by reason of the cut.'" See, also, *Oliver v. Railroad Co.*, 9 Q. B. 409; *Atlanta & R. R. Co. v. Wood*, 48 Ga. 565.

The assignments of error are all dismissed. Judgment affirmed.

NEWELL

v.

MINNEAPOLIS, LYNDALÉ AND MINNETONKA R. Co.

(Advance Case, Minnesota. April 5, 1886.)

The public easement in a public street is the public and common right to use the same for the passage of persons and property, and for purposes incidental to such passage.

The owner of the soil over which a street is laid, has the right to insist that a street shall be used for the legitimate purposes of its creation and existence, and in a manner proper to effectuate the same.

When a street is being used for the purpose (legitimate in its general nature) of the passage of persons and property, but objection is made to the mode of use, the question of rightfulness depends upon whether the use objected to is consistent or inconsistent with the common public use in which every person is entitled to share. This question of consistency or inconsistency is a question of law. That is to say, the facts of a given case being ascertained, it is for the court to pronounce upon their effect, and to determine whether a manner of using a street complained of is, or is not, all things considered, a substantial infringement upon the common public right.

Held, in the application of the foregoing principles to the particular state of facts found in this case, and given in detail in the opinion, that the use of a public street in the city of Minneapolis by defendant, with the permission of the public authorities, for the construction and operation of its railway, is the use of it in aid of the street as a passenger street railway, and not the imposition upon the soil of the street of a servitude additional to the proper street easement. And this notwithstanding the fact that said railway is operated by steam, and is used for the purpose of transporting persons from its terminus within the city to a point 18 miles outside of the city limits, as well as for transporting persons from one point in the city to another, and that outside of said limits it is, to some extent, operated as an ordinary commercial railway.

Held, further, that plaintiff, as owner of the soil of the street, having no right to object to defendant's use of the same on the ground that it imposes a servitude additional to the proper street easement, and the defendant being in possession (so far as necessary for the purposes of its railway) of the street with the sanction and acquiescence of the public authorities, the plaintiff is not in a position to object that defendant, in its use of the streets and the operation of its railway, is acting *ultra vires*, or that it is invading the franchise of another corporation.

APPEAL from an order of the district court, Hennepin County.

Hart & Brewer and *A. L. Levi* for appellant.

Cross, Hicks & Carleton for respondent.

BERRY, J.—Plaintiff is owner of certain land abutting on a public street in Minneapolis called "First Avenue South," and therefore owner of the fee of the half of the street adjoining his premises, subject to the street easement. As the complaint al-

FACTS.

leges, defendant—a railway corporation, and assuming to act as such—has wrongfully entered upon plaintiff's portion of the street, and taken possession thereof for its roadbed, laying down ties and rails thereon, and using and continuing in possession thereof, for the operation of its railway, all without plaintiff's consent, and without payment of compensation. The plaintiff brings this action in the nature of ejectment for a restitution. In our judgment the case can present but two questions :

1. Is the construction, maintenance, and operation of defendant's railway, the imposition upon the soil of First Avenue South, adjacent to plaintiff's premises, of a servitude additional to the proper public easement in such street? If this question be answered in the affirmative, the case is at an end, for the additional servitude (if any there be) having been imposed upon plaintiff's soil without his consent and without compensation, he is entitled to put a stop to its continuance. But if the question be answered in the negative, then the second question is, can the plaintiff object to defendant's use of the street for the purposes of its railway?

ADDITIONAL
BURDEN
UPON
THE SOIL.

To answer the first question it is necessary to consider to some extent the nature of a street easement. The public easement in a public street is the public and common right to use the same for the passage of persons and things, and for purposes incidental thereto. The exercise of this right is subject, in some degree, to regulations to be made by the proper authorities. The ownership of the soil on which the street is laid being absolute, subject only to the street easement, the owner has the right to insist that the street shall be used and enjoyed for the legitimate purposes of its creation and existence, and for no others. As the right of use is public and common, every member of the public, i.e., every person, is entitled to avail himself of it; and hence no person can lawfully monopolize its use, or, what would amount to the same thing, use it so as to exclude any other person from it.

This proposition is, however, not to be understood as trenching upon any right which the public authorities may possess to prescribe the purposes for which a particular street shall be used; as, for instance, for light or heavy traffic, as the case may be. How the monopolizing of the use of a street, or the illegal exclusion of any one from it, is accomplished cannot be important. They may be effected either by an appropriation or occupation of the entire surface of the street, or by the use of a part of it in such way as to render its legitimate use by others impracticable, and thus practically deprive them of its use altogether. Thus, for instance, an ordinary railroad, constructed and operated in and along a street, though it is used for the passage of persons and property, and is therefore, so far as this general nature of its business is concerned, using the street for proper

MONOPOLIZING
USE OF STREET.

street purposes, yet the mode of its construction or operation, or both, is such as to monopolize the street, and virtually and practically exclude the general public from its legitimate use. So that the use of the street for such railroad is inconsistent with the common and public use of it, in which every person is entitled to share, and hence it is held to be the imposition upon the soil of a servitude differing from, and additional to, that of the proper and lawful street easement. The case of an ordinary street railway is otherwise. There the street is also used for the passage of persons and property, but in such manner as not, substantially, to interfere with the common and public right of every person to use the street also; and so the use of a street by such street railway is held not the imposition of an additional servitude. So that when a street is being used for the purpose (legitimate in its general nature) of the passage of persons and property, but objection is made to the mode of use, the question of rightfulness depends upon whether the use objected to is consistent or inconsistent with the common public use, in which every person is entitled to share.

This question of consistency or inconsistency is a question of law; that is to say, the facts of a given case being ascertained, it is for the court to pronounce upon their effect, and to determine whether a manner of using a street complained of is or is not, all things considered, a substantial infringement upon the common public right. We say a substantial infringement, all things considered, because it is not every mere inconvenience or temporary hindrance to which one person in using a street may be subjected by the manner in which another uses it, which presents a case of inconsistency with the common public right. The inconsistency must be such that the common public use cannot, in its substantial integrity, coexist with the use complained of. If the existence of the latter is inconsistent with the substantial integrity of the former, then the latter cannot stand as a proper and lawful use of the street easement. If the use complained of is such that the public and common right of passage of persons and things cannot be enjoyed without substantial impairment on account of the manner of such use, then it is inconsistent with the public and common right, and not a proper and lawful use of the easement of the street. But no merely technical or trifling interruption or obstruction is to be regarded as a substantial impairment, for common sense requires that these words should receive a reasonable and liberal construction, and it must always be borne in mind that in organized civil society the individual must necessarily enjoy a common public right with reference to the general convenience and the rights of others. The foregoing rules and principles are, in our judgment, fully supported, either directly or by logical deduction, by *Carli v. Stillwater S. R. & T. Co.*, 28 Minn. 373, and the authorities there cited.

It remains to apply them to the facts of this case as found by the court below to exist when this action was commenced, which, so far as deemed material for this purpose, are as follows: At the time when this action was commenced defendant's rail-
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way extended from near the westerly end of the suspension bridge, a central place in the city of Minneapolis, for a distance of one and a half to two miles within the city limits; thence via Lakes Calhoun and Harriet for a further distance of about 18 miles to Lake Minnetonka. Defendant's line of railway is a single track of three-foot gauge (with occasional turnouts), and so laid with a light T rail that the top of the rail conforms to the surface grade of the street or roadway, and so planked at the sides of the rails, and filled and graded between the rails, that the track does not interfere with the passage of vehicles, or with any use of the highway, more than do the flat rails, well laid, of the ordinary horse railroad. The passenger cars are from 34 to 37 feet long, and so constructed that travellers can readily step on or off the same to or from the street or road. Within the city, and as far out as Lake Calhoun, they are drawn either singly or in trains of from two to four cars, and, on rare occasions, in greater number than four cars, by Baldwin motors, which are small steam-engines entirely encased in cabs, so that no part of the machinery is visible from the outside, and from 19 to 21 feet long, having the appearance of a short car, except that a smoke-pipe about nine inches in diameter stands a foot or more above the top of the cab. No bell or whistle is used. The steam is exhausted in the engine. Anthracite coal is used for fuel, making little or no smoke, and neither smoke nor steam is often perceptible. Between Lakes Calhoun and Minnetonka a narrow-gauge locomotive engine is used to draw some trains, and some are drawn by the motors. Six trips or more each way per day have been regularly made between the city terminus of the railway and Lake Calhoun, but a less number between Lakes Calhoun and Minnetonka. The cars are moved along First Avenue South, past plaintiff's land, and through all the closely settled portion of the city, at a speed of three to four miles an hour, and are furnished with air-brakes, and can be stopped in the distance of from two to six feet. Between the closely settled portions of the city and Lake Calhoun the speed is greater, reaching six miles an hour, and between Lakes Calhoun and Minnetonka it is increased in some places to 15 miles an hour or more. There are no depots, stations, or platforms connected with said railway, but within the city, and as far out as Lake Calhoun, the passengers are taken on and let off along the street, and at street crossings, whenever they choose, as is customary on street railways. The uniform fare for passengers within the city limits, as existing when this action was brought, has been five cents, with the same fare for persons residing near the line of the railway as far out as Lake Calhoun. Higher rates of

fare for other persons travelling between the city and the lakes, and between the lakes or points outside of said city limits, have been fixed and received. Between Lakes Callhoun and Minnetonka the cars stop to take up and discharge passengers at any highway crossing. Within the city, as bounded when this action was commenced, defendant's railway has been operated solely for the carriage of passengers, and a large share of its business and income has arisen from passengers carried thereon from point to point, as they might desire, along the streets traversed by said railway. In the warm season it also carries many passengers gathered up along such streets to said lakes, and back again, such lakes being suburban resorts, frequented in such seasons by inhabitants of, and sojourners in, said city. Between Lake Minnetonka and a point near, but outside, the recent boundary of the city, said railway has carried some cord-wood and other freight.

These are, in substance, the facts found by the trial court upon the branch of this case now under consideration, and upon them our decision must be based; for they are supported by the evidence.

**CONCLUSIONS OF
LAW.**

and if it be true that upon any particular point or points the evidence would warrant fuller or other findings, that defect (if it exist) should have been remedied upon a motion to correct the findings before bringing the case to this court. Upon its findings of fact the trial court was of opinion, and so found, as conclusions of law, (2) that defendant's railway, as constructed and operated on First Avenue South, and elsewhere within the limits of the city as bounded when this action was commenced, was and is a passenger street railway, and this character is not changed by the fact that between some point outside of said city limits and Lake Minnetonka it ceases to be a passenger street railway; (3) that the construction and operation of said railway partly on that part of First Avenue South of which the "ultimate fee" is in the plaintiff do not constitute any additional burden or servitude beyond the public easement contemplated in the dedication of the street, nor any taking or appropriation of the property of the plaintiff as owner of the fee.

Both of these conclusions are, in our judgment, correct.

The first clause of the first, viz., that defendant's railway is a passenger street railway, is in effect a finding that its use consists

in the transfer of persons along or over the streets within the city, and would seem to be a mere result or summing-up of the previous findings of fact upon that subject, and it is therefore, perhaps, quite as much in

the nature of a conclusion of fact as a conclusion of law. It is enough to say in regard to it that it is the legitimate result of the previous findings of fact. The last clause of this conclusion, viz., that this character of the railway is not changed by the fact that at some point outside of the city it ceases to be a passenger street rail-

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RAILWAY HELD
A PASSENGER
STREET RAIL-
WAY.**

way, is right as a conclusion of law. If it is, in fact, a passenger street railway within the city limits, how can it become anything else there because it becomes something else elsewhere? A person who desires to go from any part of Minneapolis to San Francisco has the same right to use the streets of the former city for the purpose of passing out of it on his way to his destination as a person who simply desires to pass from one place in Minneapolis to another in the same city. The use of the streets is just as legitimate, and just as clearly and completely a lawful and proper enjoyment of the public and common easement, in the one case as in the other.

Take the case of an old-fashioned stage line taking its passengers from its station, say at the Nicollet House, in Minneapolis, and conveying them to Shakopee, would it ever occur to any one that the use for that purpose of the streets of Minneapolis as far as they extended on the way would not be entirely legitimate, and entirely within the purposes of dedication, because the streets used were only a part, and small part, of the entire route of the line, and the line was run exclusively for the purpose of conveying persons to and from places outside of the city of Minneapolis? Or is it any objection to the use of a street by a horse railway that the line extends into the country, and carries passengers accordingly. Such illustrations as these (and they could be multiplied indefinitely), as it seems to us, demonstrate the correctness of the conclusion arrived at by the trial court, which we are now considering. It cannot be that a proper use of the streets of a city can be made improper by the fact that the instrumentalities through which that use is enjoyed are changed, as respects their mode of operation, after the city boundaries are passed over, or that the use of the streets of a city for the purpose of going out of it, or of coming into it, can be improper or illegitimate, or in any sense the imposition of a servitude additional to the ordinary street easement.

The other conclusion of law, viz., that the construction and operation of defendant's railway do not impose any additional servitude, etc., has given us more trouble; IMPOSITION OF ADDITIONAL SERVITUDE. for while the previous finding that defendant's railway is, within the city limits, a passenger street railway may be true in the sense that it is there a railway used and operated exclusively, or substantially so, for the transportation of passengers from one part of the city to another, still that fact alone and by itself would not materially distinguish it from what is styled by counsel an ordinary "commercial railway," used exclusively to bring passengers into, or carry them out of, the city. Yet this ordinary commercial road (so called) has been held by this court in several cases, as well as by a majority of the courts in other States, to impose a servitude additional to the ordinary street easement, and therefore to infringe the rights of the owner of the soil over which the street is laid. It is otherwise, however, with the

ordinary horse street railway. Where, then, is the distinction? Both are used for the conveyance of persons from one part of the city to another, and in that sense both are street railways and both operated in aid of the street, to facilitate the passage of persons over the same. We think the answer to the question is found in the general rules and principles laid down, and to some extent expounded, in the early part of this opinion.

A railway upon a street, engaged in carrying persons and things over the same, whether from one point to another on such street or in the city, or from points inside to those outside, or *vice versa*, is or is not rightfully using the street (with, of course, the sanction of the proper authorities), according as its use is or is not consistent with the common public use of the street, in which every person is entitled to share. Now, whatever facts may exist in this case, or whatever facts may have been shown which are not embraced in any finding, there is nothing in the findings of fact from which it can be inferred, as a conclusion of law, that defendant's use of the street, in constructing, maintaining, or operating its railway, is inconsistent with the common public use; nothing to show that the two uses may not coexist without any substantial infringement or interruption of the latter by the former; while, so far as construction and maintenance are concerned, the facts are expressly found that the surface of the street is not essentially changed or disturbed. There is no fact found showing that the operation of defendant's railway seriously jeopardizes or interferes with the safety and security or convenience, as respects either person or property, of any one who desires to avail himself of the public and common right of user. It may well be that defendant's railway could be so operated, even as a purely passenger street railway, as substantially to interfere with, if not to put a practical end to, the use of the street by the general public.

It is not impossible to conceive that an ordinary horse street railway could be operated with like effect. Suppose, for instance, that a horse railway were permitted to occupy the entire breadth of a street with its tracks and to run its cars at the rate of one in one or two minutes, what would be the value of the ordinary street easement in such a state of facts? This illustration is, as it seems to us, in point for the purpose of showing that the manner and effect of operating a street railway are the tests of its rightfulness; and while the manner and effect of operating defendant's railway might have been such as to interfere substantially with the public and common right, the findings do not show that it was so in this case, which, as it is important to bear in mind, was tried with reference to the state of facts set up in the pleadings as subsisting at the time when this action was commenced.

DEFENDANT'S
USE OF STREET
NOT INCONSISTENT WITH PUBLIC USE.

The railway in question in *Carli v. Stillwater S. R. & T. Co.*, *supra*, was neither more nor less than a connecting link between two ordinary (so called) commercial railways. The effect was the same as if one of these railways had been extended over it to a junction with the other, so that the railway in that case was really and in effect an ordinary "commercial railway, and in no sense in aid" of the street. Upon this ground the opinion and determination in that case proceeded, holding, under the decisions of this court, and in accordance with the view prevalent elsewhere, that as such ordinary commercial railway it imposed a servitude upon the street additional to the proper street easement. But the defendant's railway is a different thing, and clearly in aid of the streets over which it runs. It takes on and discharges passengers at any street crossing upon its line, as does an ordinary horse railway; and this practice applies as well to those who get on for the purpose of going out of the city or of coming into it as to those who get on and also get off within the city limits. Such a railway is in aid of the street, because it facilitates the passage of persons over the street, enabling them, in large numbers, to pass over it with far less noise, trouble, and expense than if each should pass on foot or in an ordinary vehicle, and without, so far as this case shows, any substantial interference with the public and common right of passage. Upon all these considerations we therefore conclude that defendant's railway was, within the city, properly a street railway; and that its construction, maintenance, and operation do not impose upon plaintiff's soil a servitude additional to that of the ordinary street easement, so as to make defendant's use of the street unlawful without compensation to plaintiff.

Having thus answered the first main question presented in this case in the negative, we are brought to consider the second, viz., Can the plaintiff object to defendant's use of the street (in the manner found by the trial court) for the purposes of its railway? We say whether the plaintiff can object, because if he cannot it makes no difference in this action whether defendant has in fact any legal right to construct, maintain, and operate its railway on First Avenue South or not. The plaintiff having, as we have seen, no right to object on the ground that defendant's use of the street imposes a servitude additional to the proper street easement, his objection, if any, must be that defendant is not authorized to use the street easement in the way in which it does. The charter of the city of Minneapolis commits the care, supervision, and control of the streets to the common council. By ordinances passed March 22, 1882, before this action was commenced (in November, 1882), and subsequently, the council gave defendant permission to operate its railway, and with steam-power, on First Avenue South, and other

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OF STREET FOR
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streets, to June 1, 1883, a date subsequent to the trial of this action. As a result of this, and of the conclusion arrived at upon the first branch of the case, the defendant was in fact lawfully in its possession (such as it was) and use of the street, so far as the public authorities were concerned. It had, at least, their license and acquiescence in its favor.

But it seems that by an ordinance of July 9, 1875, a corporation denominated the Minneapolis Street R. Co. was granted the exclusive right, subject to conditions not here important, of constructing and operating street railways in the city of Minneapolis, in such streets as the city council may deem suited to that purpose; and by ordinances of July 3 and 8, 1878, and said company, its successors and assigns, were authorized, upon similar conditions as above, to construct and maintain a street railway line on First Avenue South, and other streets (being the route of defendant's railway); and "to operate such line of railway with animal, steam, or other power, the right to prohibit the use of steam when the public good required being reserved." On October 24, 1878, the Minneapolis Street R. Co. and the defendant, pursuant to authority given by their respective boards of directors, formally entered into a written contract whereby, among other things, and for a sufficient consideration, the street railway company leased to the latter for 43 years its right and franchises to the use, for suburban railway purposes, of First Avenue South and said other streets, and the lease was duly recorded November 17, 1878. Immediately upon the execution of this contract defendant entered upon First Avenue South and the other streets mentioned, and at large expense constructed thereon its railway, which it has ever since maintained and operated, no other railway having been constructed on that route.

Now upon this state of facts, and with reference to the conclusion arrived at upon the first branch of this case, both the public authorities and the street railway company appear to acquiesce in and sanction defendant's use of the streets. It matters not whether defendant is acting strictly within the terms of its charter or of the so-called lease from the street railway. It is there upon the ground in actual possession (so far as necessary) and use of the streets. Whether it is there as a corporation, association, or partnership; whether in the exercise of its lawful corporate franchises or *ultra vires*,—so long as its use of the streets is a proper street use, under sanction of public authority,—the plaintiff cannot complain. If the exclusive franchise of the street railway company is invaded, either because the so-called lease is unauthorized and void as a lease, because executed without proper authority, or because the rights of that company are not transferable, or because defendant is not an "assign" within the meaning of the ordinance, that is the affair of the street railway company, or of the city, or possibly of the

State, and not of the plaintiff. For these reasons the second main question in the case must be answered in the negative also.

Order denying new trial affirmed.

MITCHELL, J. (dissenting).—It seems to me that the maintenance and operation of defendant's railroad constitute a servitude additional to, and different from, the use for which the streets were acquired,—in short, a new use of the streets, not contemplated at the time of their dedication. I do not see that this road differs materially from any ordinary "commercial" railroad, except that it uses the entire length of the street as its depot, at which it receives and lets off passengers. As operated, it is, to a certain extent, in aid of travel on the street; but this is a secondary and incidental, and not its main and principal, purpose. The doctrine of the opinion will, it seems to me, lean to the insidious encroachment of any and all railroads upon the public streets by their simply adopting certain slight and merely colorable changes in their mode of operation. I therefore dissent.

Street Railway not an Additional Burden.—*Randall v. Jacksonville St. R. Co.*, 17 Am. & Eng. R. R. Cas. 184; *Hiss v. Baltimore, etc., R. Co.*, 4 Ib. 201; *Eichels v. Evansville St. R. Co.*, 5 Ib. 274.

Use of Land as a Railroad not Inconsistent with its Public Use as a Highway.—Plaintiff sought by writ of *certiorari* to quash the proceedings of the board of street commissioners of the city of Boston in laying out a footway over petitioner's railroad. Plaintiff maintained that no town or city or board of street commissioners is authorized by law to lay out a footway over or across a railroad. The public statutes of Massachusetts, ch. 112, sec. 125, provided that "a highway or townway be laid across a railroad previously constructed when the county commissioners adjudge that the public convenience and necessity so require." *Held*, that the appropriation of land to the use of a railroad is not so inconsistent with its public use as a highway crossing as to prohibit its subsequent appropriation for that purpose. The court say: "We do not regard that statute as an enabling act, authorizing highways and townways to be laid out across railroads, but as recognizing and regulating an existing right. Highways and railroads are both established by the legislative exercise of the right of eminent domain, delegated in the one case to public officers and in the other to private persons. Both are franchises, the one delegated to public officers to be exercised for the public good; the other granted to individuals to be exercised for their emolument, because the public good will be thereby subserved. The legislature has authority to grant either so as to interfere with a previous grant to the other, providing for compensation when private rights are impaired. When both are granted, under general laws as well as when one is made a special act, the question whether the one will be controlled or limited by the prior exercise or grant of the other must depend upon the intention of the legislature, and the question we are considering is, whether the appropriation of the land to the public use of a railroad is so inconsistent with its public use as a highway crossing as to prohibit its subsequent appropriation for that purpose. We think it is very clear that it is not. See language of *Shaw, C. J.*, in 23 Pick. 397. It is sufficient to refer to the cases of *Willington, Petr.*, 16 Pick. 87, and *Boston Water Power Co.*, 23 Pick. 361." *Boston & Albany R. Co. v. City of Boston (Massachusetts, Sep. 1885)*, 1 New England Rep. 94.

Highway across Track of Foreign Railroad Corporation—Notice required.—A highway was established after the defendant had constructed its road. The defendant was a foreign corporation, but at all times had station agents within the county. Section 936 of the Iowa Code provided that before a highway could be lawfully constructed, "a notice shall be served on each owner or occupier of land lying in the proposed highway, or abutting thereon, as shown by the transfer-books in the auditors's office, who resides in the county, in the manner provided for the services of original notices in actions at law, and such notice shall be published," etc.

The defendant owned its right of way, but it did not appear that its ownership was shown by or could be ascertained from the transfer-books in the auditor's office. No notice of the establishment of the proposed highway was given except by publication. *Held*, that the defendant was not entitled to notice either as an "owner" and "occupier" otherwise than by publication of the proposed establishment of the highway. *State v. Chicago, etc., R. Co.* (Iowa, Dec., 1885), 26 N. W. Repr. 87.

Dedication of Land for Highway—Acceptance.—Complainant sought to enjoin defendant company from constructing their road over certain lands conveyed by her for the use of defendants, on the ground that the land had been dedicated for a public highway. The dedication, however, had not been accepted. *Held*, that until, in the judgment of the local authorities, the land was required by the public, the owner may make any use of it he pleases. *Booraem v. North Hudson Co. R. Co.*, 39 N. J. Eq. 465.

Obstruction of Highway—Indictment—Lessee.—When a railroad corporation, without law or right, so obstructs a highway by building the roadbed within its limits that it could be indicted for creating a nuisance, the lessee of such railroad company, from lapse of time, or acquiescence on the part of the town, gains no right to encroach further upon the highway, as the exigencies of its business may require, for the purpose of widening, repairing, and straightening its track; and there is no presumption that the company in taking a part took the whole of the highway, when all the evidence tended to prove that the original obstruction was without authority of law. And if such lessee, in repairing its track, suffer stone and gravel to run into the highway, and remain there an unreasonable time so as to impede travel, it would be an indictable nuisance. *State v. Troy & Boston R. Co.*, 57 Vt. 5.

Abatement of Obstruction of Highway as a Nuisance—Injunction.—Where a railroad company entered upon a street, excavated it, built and maintained a railroad thereon without authority, a property-owner on said street may recover damages arising from the nuisance complained of, both direct and consequential. If necessary to a complete and effectual abatement of the nuisance, an injunction against its continuance may properly be adjudged for that purpose. *Colstrum v. Minneapolis & St. Louis R. Co.* (Minn., July, 1885), 24 N. W. Repr. 255.

Recovery of Damages by Adjacent Owner.—A railroad company so constructed its crossing of an intersecting turnpike as to cut off the use of the pike as a means of egress and ingress to the adjacent lands or causing water to run or stand on such lands, is liable for the resulting damages. *Louisville, etc., R. Co. v. Finley*, 7 Ky. Law Repr. 129.

Where there is a mere encroachment upon a street by a railroad company that owns and uses lots on one side of such street for its tracks and station, and such encroachment causes no injury to abutting property, no action can be maintained by a lot-owner under Code of Iowa, § 464. (*Iowa*, June, 1885.) *Binard v. Burlington*, 23 N. W. Repr. 914.

ST. PAUL, MINNEAPOLIS AND MANITOBA R. Co.

v.

CITY OF MINNEAPOLIS.

(Advance Case, Minnesota. April 7, 1886.)

Under a city charter conferring a general power to lay out and extend streets, an authority to extend the same across the roadway of a railway corporation will, as a general rule, be implied.

The appropriation of land occupied as such roadway for a street-crossing, in such cases, is necessarily subject to the prior public use of the railway corporation, but is not ordinarily inconsistent with it.

The action of the city council in determining the necessity and propriety of extending streets in such cases, if regular, is not subject to judicial revision except upon appeal.

In the assessment of damages for such street-crossing it is error to offset, supposed benefits to the railway company for the opening of such street across such roadway. But where a remedy is afforded by appeal for the correction of erroneous assessments, the proceedings are not void for such cause.

In proceedings *in rem* for the condemnation of land, and the assessment of the owners' damages therefor, it is competent for the legislature to provide for constructive notice of the proceedings to the parties interested by publication.

APPEAL from an order of the district court, Hennepin county, overruling plaintiffs demurrer to defendant's answer.

Benton & Roberts for appellant.

J. N. Cross for respondent.

VANDEBURGH, J.—The city council of Minneapolis have laid out, and are proceeding to open, a street across the tracks and right of way of the plaintiff corporation, within the limits of the city. This action is brought to enjoin such proceedings.

1. The plaintiff claims that the opening of the street in question in the particular locality is unauthorized, because the land is already appropriated and used by the corporation for a public purpose, and that the proposed further public use of the land for a street would be inconsistent with, and subversive of, such prior public use. The demurrer to the answer brings up the question as to the sufficiency of the facts alleged in the complaint to warrant the relief sought. It is evident that the primary and principal purpose for which the land in question was acquired and is appropriated by plaintiff is for its roadway, and the passage of regular and local transfer trains. Two tracks have been constructed, and are so used on such right of way, and to accommodate the large and increasing business and

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traffic of the company other tracks are required, and are contemplated or in process of construction, to be used "for the whole distance between Minneapolis junction and University switch," particularly for hauling and transferring cars, and for business to and from the mills, depots, or elevators situated in the city, and for standing room for cars while awaiting transfer to points of loading and unloading. This is a use of a roadway for which it is very natural and convenient to appropriate the railway tracks, including side tracks, in large cities, for long distances; yet it was never considered that such use was inconsistent with the right of the public to necessary street-crossings over such roadway. The mere fact that the proposed street extension will necessarily cause more or less inconvenience and expense to the plaintiff is not of itself ground for equitable interference by the court. Such consequences necessarily follow from street-crossings, and would have been the same if it had happened that the street had been laid out before the railroad. The distance from "the Minneapolis junction to the University switch" is not stated, but it is manifest from the tenor of the complaint that it must be considerable. This is a part of the roadway used for the passage and operation of trains for traffic. It is not ground used for depot purposes, or set apart for storing cars, or exclusively for making up trains, and the case presented does not fall within the rules laid down in *Railroad Co. v. Faribault*, 23 Minn. 167. We have found no case extending the doctrine there applied to necessary street-crossings over the roadway proper of a railway corporation, though the tracks be numerous and much used. *Boston & A. R. v. Greenbush*, 52 N. Y. 511; *President, etc., v. Whitehall*, 90 N. Y. 25.

The appropriation made by the city is, of course, subject to the prior public use; but the two uses are not necessarily inconsistent. USES NOT IN-
CONSISTENT. and in all ordinary cases may stand together. The

general rule is that the power to extend streets across the right of way and tracks of a railway company is implied in the general authority conferred by city charters for such purposes, without express legislative provisions upon the subject (*St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 362); and we think there is nothing in this case to take it out of the operation of such general rule.

Danger and delays are necessarily incident to such crossings, but there appears to be no good reason, after all, why the two public DANGER AND DE-
LAY. uses may not be so adjusted in practice as to work no serious detriment to the public interests served by the corporation, and the risk and inconvenience in large measure fall upon the travelling public using the streets crossed by railways. In this instance, the appellant contends that the grade of the street should be raised, and the tracks bridged; but this will be a matter for the consideration of the proper authorities, if experience shall

demonstrate its necessity. It is not a question which properly enters into discussion of the case as here presented.

The complaint alleges that the opening and extension of the street "in the manner complained of" is wholly unnecessary, and is not demanded by any public requirement, and that if a street is so required, it should be constructed at such grade as to be carried over the railroad. The objection urged is rather to the manner of crossing than to the propriety of opening the street across and beyond the tracks, and it is conceded that the city council have acted on and determined the question. The council are given the general power to lay out, extend, and open streets, and it is not questioned that the proceedings in this instance have been regular, and in conformity with the provisions of the charter; and it must be presumed that the judgment of the council in respect to the necessity of the extension of the street in question was properly exercised. The most important question to be considered in such cases is whether the new use to which the railroad property is sought to be subjected by the municipal authorities is such as to be inconsistent with the prior public use. If it is not, the street may be opened under the general power to condemn conferred by the charter, and the determination and proceedings of the city council in the premises, if regular, cannot be attacked collaterally, and are not subject to judicial review, unless allowed upon appeal in the same proceeding. *Little Miami, etc., & X. R. Co. v. City of Dayton*, 23 Ohio St. 519. If it is inconsistent with such prior use, then there must be express legislative authority to proceed in the particular instance, or a necessary implication of such authority; and in the latter case the necessity of appropriating the particular property for the purposes of a street would have to be shown. *St. Paul Union Depot Co. v. St. Paul*, 30 Minn. 363. But the general authority to lay out and extend streets is generally held to be sufficient to warrant the action of the proper authorities in extending a street across the roadway of a railway corporation. *New Jersey S. R. v. Commissioners*, 39 N. J. Law, 33; *City of Bridgeport v. Railroad Co.*, 36 Conn. 265; *Little Miami, etc., R. v. Dayton*, 23 Ohio St. 517. For the purposes of this case, therefore, the concession that the council have regularly laid out the street is sufficient evidence of the necessity for the same.

3. It seems that the damages assessed and allowed to the plaintiff for the appropriation of the land for the extension of the street is the sum of one dollar. This can only be accounted for on the supposition that the damages were set off against benefits assessed by the commissioners. This was clearly erroneous. It is difficult to see how plaintiff's roadway could be benefited or improved by such street-crossing. But as a remedy for an erroneous assessment is provided by appeal in such cases, the same is not

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to be deemed void for such cause. *New York & H. R. Co. v. Morrisania*, 7 Hun, 653.

4. The plaintiff further complains that the notice of the condemnation proceedings, and the assessment of damages provided by the charter, and the only notice in fact given in this case, was by publication. It is certainly remarkable that in a matter so important to the interests of property holders the legislature should have made no further or more adequate provision in the charter for notice of the pendency of proceedings for the assessment of damages in this class of cases. But this was a question for the legislature, and we do not think the proceedings void because the notice provided was constructive, or by publication. The proceedings are *in rem*, and it is the rule generally recognized that in such cases the legislature may provide that the compensation due the owner of the lands taken may be ascertained upon constructive notice merely, as well as upon personal notice. 2 Dill. Mun. Corp. § 471, and cases; *Cupp v. Commissioners*, 19 Ohio St. 182; *Owners, etc., v. Mayor*, 15 Wend. 376; *People v. Mayor*, 4 N. Y. 441. This rule has frequently been acted on and adopted in the legislation of this State. In the case of ordinary highways, provision is made (wisely, we think) for service upon occupants of lands proceeded against (Gen. St. c. 13, § 35), but no distinction is otherwise made between residents and non-residents, whether the lands are vacant or occupied. Order affirmed.

Laying out Street over Railway Tracks.—See *State v. Drummond*, 17 Am. & Eng. R. R. Cas. 20; s. c., 149; *Town of Storm Lake v. Iowa Falls, etc., R. Co.*, 20 Id. 420; *Gilmon v. Haverhill*, 1 Id. 20.

WRIGHT, Assignee, etc., v. KENTUCKY AND GREAT EASTERN R. Co. *et al.*

FARMERS' LOAN AND TRUST Co. v. WRIGHT, Assignee, etc., *et al.*

(*Advance Case, U. S. Supreme Court. March 1, 1886.*)

The Kentucky & Great Eastern R. Construction Co. acquired no ownership of, or lien on, the constructed road between Newport and Catlettsburgh under its contract of May 22, 1873, with the Kentucky & Great Eastern R. Co., for the construction of the road.

The construction company's contract was subject to the terms and conditions of the contract of January 15, 1873, between the owners of the Maysville & Big Sandy R. and the Kentucky & Great Eastern R. Co. for a conditional sale of said property to the railway company, of which contract the construction company had notice.

Under the mortgage executed by the Kentucky & Great Eastern R. Co., February 15, 1872, the Farmers' Loan & Trust Co., as mortgagee, took only

such rights as the mortgagor had, or subsequently obtained, as against the vendors of the Maysville & Big Sandy R. and the mortgagor never having obtained title to said road, the mortgagee was therefore bound by the forfeiture under the conditional sale.

APPEALS from the circuit court of the United States for the District of Kentucky.

C. L. Raison, Jr., for Wright, Assignee, etc., and others.

A. F. Perry for Kentucky & Great Eastern R. Co. and others.

John A. Campbell for Farmers' Loan & Trust Co.

BLATCHFORD, J.—On the eighteenth of December, 1850, the legislature of Kentucky, by special act (2 Laws 1850, c. 96, p. 73), created a corporation known as the "Maysville & Big Sandy R. Co." (hereinafter called the "Big Sandy Co.") with power to construct and maintain a railroad, commencing at or FACTS. near the city of Maysville, Kentucky, and running thence to the Big Sandy River by such route as might be found practicable. The act gave authority to the counties of Mason, Lewis, and Greenup, and to any town in any of those counties, to subscribe to the stock of the company, when authorized by a majority of the voters of the county or town, the proposition to be submitted to them by the directors of the company; and the issue of bonds by the counties and towns in aid of the railroad was provided for. This indicated that the route of the road was expected to run through the counties above named. Maysville is in Mason county, on the south bank of the Ohio River. Lewis county adjoins Mason on the east, and Greenup adjoins Lewis on the east. All three of them lie along the south bank of the Ohio River. The next county in Kentucky east of Greenup is Boyd, and the Big Sandy River, after being for some distance the boundary between Kentucky and West Virginia, empties into the Ohio River, in Boyd county, only a short distance eastward of the line between Greenup and Boyd counties. For the railroad to reach the Big Sandy River it was necessary it should pass for a short distance through Boyd county. The company was organized and began the construction of the road in 1853, and after expending a considerable sum of money, claimed to have been \$300,000, it became financially embarrassed, and suspended the work permanently in 1854. To secure certain of its creditors, it executed one or more mortgages to them on its road and all its franchises and chartered privileges.

By an act of the legislature of Kentucky approved February 17, 1866 (Laws 1866, c. 755, p. 664), those mortgages were declared to be legal, and authority was given to foreclose them by proceedings in the Mason circuit court, with power to that court to sell the road, with all its property, rights of property, franchises, and chartered privileges, at public sale; and the act provided that the pur-

chasers at the sale, after it had been approved by the court, should be invested with the title to the road and all its franchises and chartered privileges, and should have power to reorganize the company under its charter, and, for the purposes of its charter, to "make contracts with individuals, corporations, and other railroad companies for the building, completion, and operation of said road, or any part thereof." The foreclosure proceedings were had in 1869, resulting in a decree, and a sale thereunder, at which M. Ryan, H. Taylor, Elizabeth Gray, W. H. Wadsworth, John B. Poyntz, and John G. Hickman, trustee of Charles B. Coons, deceased, became the purchasers of what the act of 1866 authorized to be sold, and a deed of it was made to them, but was not recorded until 1875.

On the twenty-first of March, 1870, the legislature of Kentucky, by a special act, (2 Laws 1870, c. 867, p. 545), created a corporation known as the "Kentucky & Great Eastern R. Co." (hereinafter called the "Great Eastern Co.") The tenth section of that act gave power to the company to construct a railway from such point or points in the cities of Covington and Newport as it might select, thence through the counties of Campbell, Kenton, Pendleton, Bracken, Harrison, Fleming, Nicholas, Robertson, Bourbon, Clark, Montgomery, Menifee, Bath, Rowan, Powell, Wolfe, Morgan, Carter, Lawrence, Johnson, Magoffin, Breathitt, Floyd, Pike, and Letcher, or such of them as it might choose, to any point or points on the boundary line between the States of Kentucky and Virginia that it might select. The route thus indicated for the road, by naming those counties, carried it far to the southward of the south line of Boyd county and of any road running from Maysville through Mason, Lewis, Greenup, and Boyd counties, to the Big Sandy River. The tenth section of the act also authorized the company "to construct such branch roads to their main trunk road, in or through such counties," as it might deem proper. Provision was made in section 16, and following sections, for subscriptions by counties, precincts, cities, and towns to the stock of the company, and for the issuing of bonds to pay therefor. Section 41 provided as follows: "That the president and directors of said company may, with the assent of the holders of a majority in value of the stock in said company, purchase and hold any other railroad in this or any other State, and may subscribe stock in or aid in the building of any other road in or out of this State, whenever, in their judgment, it may be to the interest of the said railway company to do so. They may sell the said railway, or lease the same, and may build branches from said road, and branches from said branches. That said company may connect its said road, or any of its branches, with the railroad of any other company in or out of this State, and may lease and operate any railroad connecting with the road or branches of said railway; and it may con-

solidate with, and make running and operating arrangements with, any other railroad company, upon such terms as may be agreed on by the contracting parties." By sections 44 and 45 it was provided that the company might issue its bonds for \$1000 each, to an amount not exceeding \$15,000,000, to be secured by "a mortgage or deed of trust conveying said railroad and its property franchises to a trustee or trusts." The Great Eastern Co. was organized in June, 1871. On the fifteenth of July, 1871, the owners of the Big Sandy road made the following written proposition, signed by all of them, to the Great Eastern Co.:

"To the Kentucky & Great Eastern R. Co.: The owners of the Maysville & Big Sandy R. propose to accept fifty-seven thousand and seven dollars for the road, and all its rights and franchises held by them under their purchase, payable in cash or bonds of the county of Mason, or other good security. Should the payments be made in the bonds of the county of Mason, they will take the payments in such proportion as their debt bears to the sum voted by the county of Mason and the issuance of those bonds by the county to the Kentucky & Great Eastern Co. but it is hereby stipulated that, upon the acceptance of this proposition by the Kentucky & Great Eastern road, no unnecessary delay shall occur in taking the vote of the county of Mason upon their subscription to the railroad company. This proposition to remain open for acceptance for thirty days from fifteenth day of July, 1871; the work on the road to commence in good faith in six months from the fifteenth July, or this article to be void."

It is manifest that in this proposition the owners of the Big Sandy property were providing for the completion of the Big Sandy road, under the charter of the Big Sandy Co. and the act of 1866; for the only authority for the issuing of bonds of the county of Mason was that given by the charter of the Big Sandy Co., and by the proposition the bonds of that county to be taken in payment were bonds to be issued for a subscription to stock by that county, and the work which was to commence in six months was work on the Big Sandy road. The executive committee of the Great Eastern Co. accepted this proposition, and reported it to the board of directors of that company at a meeting held by them, and it was on the twenty-third of August, 1871, approved by that board. On the twenty-fourth of August, 1871, the board adopted a resolution "that the question of submitting the proposition to the various counties between Newport and Catlettsburgh, for subscriptions to the stock of the company, be referred to the executive committee, with full powers vested in them to proceed and carry such propositions into effect." Newport is on the Ohio river, in Campbell county, and Catlettsburgh is on the Big Sandy river, in Boyd county, and the counties between Newport and Catlettsburgh are Campbell, Pendleton, Bracken, Mason, Lewis, Green-

up, and Boyd, all lying on the south bank of the Ohio river. Maysville is in Mason county, about half-way between the east and west lines of that county.

In the fall of 1871, Mason county voted to subscribe \$400,000, and Lewis county voted to subscribe \$100,000, to the stock of the Great Eastern Co., the subscriptions to be paid in the bonds of those counties. There is no satisfactory evidence that any work on the road between Maysville and Catlettsburgh, or on the old line of the Big Sandy Co., was commenced within six months from the fifteenth of July, 1871, or that even surveying on that line was done within that time.

On the fifteenth of February, 1872, the Great Eastern Co. executed a mortgage to the Farmers' Loan & Trust Co., (hereinafter called the "Trust Company"), a corporation of New York, as trustee. That mortgage recites as follows: "Whereas the said Kentucky & Great Eastern R. Co., the party of the first part, has been duly chartered and organized, under and by virtue of the laws of the commonwealth of Kentucky, with power to locate, construct, equip, and operate a line of railway within the said commonwealth of Kentucky, from the city of Newport, in Campbell county, State of Kentucky, upon, along, and near the southern bank of the Ohio river, in said State of Kentucky to a point on the State line between the State of Kentucky and West Virginia, at or near Catlettsburgh, Bond county, State of Kentucky, a distance of one hundred and forty-six miles, be the same more or less." It then states that the company, "for the purpose of constructing, equipping, and completing its aforesaid line of railway," has determined to issue its bonds for an amount "not exceeding \$15,000 per mile for the whole length of said railway in the State of Kentucky," being in all \$2,190,000, and to secure the payment of said bonds "by a first mortgage upon the aforesaid railroad, franchises, and all the property, real and personal, rights and interests, now owned and possessed" by it in the State of Kentucky, or which it "may hereafter acquire therein." It then mortgages to the trust company "all and singular the entire line of the Kentucky & Great Eastern R. Co.'s railroad, extending from the said city of Newport, in the State of Kentucky, to said point in said State, on the State line between the States of Kentucky and West Virginia, as hereinbefore described, as the same is now or may hereafter be located and constructed by the said party of the first part, with the right of way, and all the real and personal property, rights, and interests of the said party of the first part to the said line of railway in the State of Kentucky, whether the same is now owned or possessed or may hereafter be acquired by the said party of the first part, and all the privileges and franchises of the said party of the first part for the holding, operating, and maintaining its said line of railway." The mortgage trust was ac-

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cepted by the trustee, in writing, March 5, 1872, and the mortgage was recorded in October, 1872, in Campbell, Pendleton, and Bracken counties; in November, 1872, in Lewis and Greenup counties; and in January, 1873, in Boyd county.

By an act of the legislature of Kentucky passed March 27, 1872, it was provided (section 1) that section 10 of the act of March 21, 1870, be amended so as to authorize the Great Eastern Co. "to construct said road through the counties of Mason, Lewis, Greenup, and Boyd, and the said Kentucky & Great Eastern R. Co. are hereby invested with all the rights, privileges, and franchises necessary, as contained in their said charter, to construct their main stem line of railway through said counties, except as hereinafter provided." Section 2 provided that whenever the company should desire to submit any vote to the qualified voters of either of the four counties above named, "for any subscriptions to the capital stock of said railway, or any branch thereof," it should be submitted under the provisions of section 16 of the act of March 21, 1870, and not otherwise. Section 2 concluded with this proviso: "Provided, further, that said Kentucky & Great Eastern R. Co. shall, previous to constructing their said road east of Mayesville, through Mason county, and on through the counties of Lewis, Greenup, and Boyd, purchase and pay for the Maysville & Big Sandy R. or make such arrangements with the owners of said Maysville & Big Sandy R. as shall be satisfactory to each of said owners." Sections 5 and 6 were as follows: "Sec. 5. The president and directors of said railroad company shall have no authority, either under this charter or the charter of the Maysville & Big Sandy R. Co., to submit to voters of any county the question of a subscription by a county to the capital stock of said company; but said subscription may alone be submitted by the county court. Sec. 6. Nothing in this act shall be construed as making valid the votes in the counties of Lewis and Mason upon the propositions voted on in said counties to subscribe to the capital stock in said counties."

Undoubtedly because of the concluding proviso of section 2 of the act of March 27, 1872, and of the fact that any agreement growing out of the proposition of July 15, 1871, was considered to be at an end, a resolution was adopted at a meeting of the board of directors of the Great Eastern Co., on the tenth of February, 1873, authorizing the president of the company, then Nathaniel Sands, "to contract with the officers and owners of the Maysville & Big Sandy R. Co. for the purchase and transfer of said road to the Kentucky & Great Eastern R. Co."

Prior to this, and on the fifteenth of January, 1873, all of the six owners of the Big Sandy property, except Poyntz (the Bank of Kentucky having succeeded to the interest of Ryan), had executed the following instrument: "Whereas the general assembly of the commonwealth of Kentucky passed an act entitled 'An act to authorize the sale of the

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Maysville & Big Sandy Railroad, and providing for the organization of a new company under its charter to construct said road,' approved February 17, 1866; and whereas said road was duly sold by a decree of the Mason circuit court in pursuance to the provisions of said act, and was purchased by M. Ryan, H. Taylor, Elizabeth Gray, W. H. Wadsworth, John B. Poyntz, and John G. Hickman, trustee of Charles B. Coons, deceased, and the sale and purchase were duly confirmed by said court; and whereas the said parties, as sole owners and corporators, having reorganized the said railroad company under their purchase and said act of the legislature, did, on the fifteenth day of July, 1871, propose to sell and transfer to the Kentucky & Great Eastern R. Co. all the property, rights, and franchises of the said Maysville & Big Sandy R. Co. held by them as the sole owners, stockholders, corporators, and officers of the same, for the sum of (\$57,007) fifty-seven thousand and seven dollars, payable in cash or bonds of the county of Mason, or other good security, in the way pointed out by the written proposition of that date, which was duly accepted by said Kentucky & Great Eastern R. Co.; and whereas the said M. Ryan (and his assignee, the Bank of Kentucky), H. Taylor, Elizabeth Gray, W. H. Wadsworth, John G. Hickman, trustee of Charles B. Coons, deceased, are desirous to faithfully carry out said contract, and recognize its binding force, and for the purpose of securing the construction of the Maysville & Big Sandy road under its charter, and that of the Kentucky & Great Eastern R. Co., and with such modification and explanations as may the better secure the interests of said proposers, and of said Maysville & Big Sandy R. Co., the Kentucky & Great Eastern R. Co. thereto consenting: now it is agreed by M. Ryan, and the Bank of Kentucky, his assignee, H. Taylor, Elizabeth Gray, W. H. Wadsworth, and John G. Hickman, trustee of Charles B. Coons, deceased, being all the owners, stockholders, and corporators of said Maysville & Big Sandy R. Co., except John B. Poyntz (who does not unite in or subscribe to this instrument), they being, however, all the officers of said railroad company, and the owners of nearly all of its stock, property, rights, and franchises, that they will sell, and do hereby offer to sell, on the terms and conditions hereinafter named, all their rights, title, and interests in and to the stock held by them in the said Maysville & Big Sandy R. Co., and in and to its roadbed, bridges, material, rights of way, and property of all kinds whatever, and in and to the franchises and charter of said company, so far as they have any power or authority, in law or equity, so to do, as owners, stockholders, corporators, and officers of said company, owning the large majority of the stock, for the sum of fifty-seven thousand and sixty-five dollars, with interest at the rate of six per cent per annum, until paid, from this date, and that they will, on full payment, transfer and convey the property, stock,

rights, and franchises aforesaid, so far as they lawfully can, by any and all instruments necessary and proper in the premises; the stock, ownership, and rights of the said John B. Poyntz in said company not being included herein, but left to stand upon the original proposition signed by him as aforesaid. And the said Kentucky & Great Eastern R. Co., wishing to assert and maintain the said contract of July 15, 1871, but willing to furnish any additional guaranty in its power to the aforesaid parties for compliance therewith, now hereby binds and obliges itself to accept the foregoing offer, and to pay to said parties making the same the sum of fifty-seven thousand and sixty-five dollars aforesaid, with interest from the fifteenth day of January, 1873, until paid, in instalments of the bonds of Mason county subscribed, or which may be subscribed, to its capital stock, to be delivered to said parties as received by said railway company, in amounts bearing the same ratio to the sum herein agreed to be paid as the instalments of bonds from time to time delivered by said county to said railway company bear to the whole number of bonds subscribed by said county as aforesaid, until the whole of said sum of fifty-seven thousand and sixty-five dollars and interest shall be fully paid. And it is agreed by said Kentucky & Great Eastern R. Co. that if, from any cause, said bonds, or any instalments thereof, shall not be delivered to said railway company by said county, and by reason thereof said bonds, or any instalment thereof, cannot be paid to said parties as herein agreed, then, in that case, and to the extent of such failure, said railway company shall make payment to said parties in cash, within one hundred and twenty days from the time such bonds should have been delivered by said county to the railway company; and upon failure to deliver either bonds or cash, as aforesaid, to said parties, then this contract to be null and void. And it is further agreed, as this contract is made to secure the construction of the line of said Big Sandy road to Portsmouth by the Kentucky & Great Eastern R. Co., that said company shall, within one hundred and twenty days from this date, commence the construction of said road in good faith, and shall continue to prosecute said construction in a reasonably diligent and effectual manner, and the failure to commence the construction as aforesaid, or, after commencing, the failure to prosecute the same as aforesaid, for the space of two hundred and forty days, shall, in either event, render this contract void; and whenever this contract, by its terms, shall become void, then, upon the happening of such event, said parties, representing the Maysville & Big Sandy R. Co. and their own interests, may enter and take possession of the road, property, rights, and franchises herein described and conditionally sold. It is finally expressly agreed that this offer to sell and transfer on full payment shall not admit, under any circumstances, of the intervention of any prior lien on the rights, fran-

chises, and property aforesaid in favor of other parties, a lien being now and always retained thereon in favor of the parties aforesaid until payment in full shall be made. In testimony whereof, all of the parties have hereunto signed, this fifteenth day of January, 1873."

On the eleventh of June, 1873, the proposition so made was accepted by the Great Eastern Co., by the signature of Sands, as its president, to this memorandum at its foot: "The foregoing proposition is accepted by the Kentucky & Great Eastern R. Co., which hereby agrees to purchase said property on the terms and conditions expressed above." On the twenty-second of May, 1873, at a meeting of the board of directors of the Great Eastern Co., a contract which had before been made by it for the construction of the road was cancelled, with the consent of the contractors, and a resolution was adopted authorizing the president to execute a new contract, similar in terms with the prior one, "with Frank Byrne, doing business under the name of 'Kentucky & Great Eastern R. Construction Co.'"

On the same day the contract was executed by the Great Eastern Co. and Byrne, as follows:

"This agreement, made and entered into by and between the CONTRACT OF
MAY 22, 1873. Kentucky & Great Eastern R. Co., by its president, under the authority of the board of directors, party of the first part, and Frank P. Byrne, of Ohio, doing business as railroad builder, under the name and style of the 'Kentucky & Great Eastern R. Construction Co.,' or their assigns, parties of the second part, witnesseth that the said parties of the second part, for and in consideration of the payment in hand of one dollar, received and hereby acknowledged, and for the further stipulations, covenants, and agreements of the said party of the first part, hereinafter mentioned, hereby agree and bind themselves to construct, finish, and equip, or cause to be constructed, finished, and equipped, the line of railway designated by the charter of said party of the first part, to be known as the 'Kentucky & Great Eastern R.,' located along the banks of the Ohio river, in the State of Kentucky, commencing at the city of Newport and extending to Catlettsburgh, on the Big Sandy river, being about one hundred and forty-six (146) miles, by such route as may be necessary to fulfil the conditions of any donations to said party of the first part, or any subscriptions to the capital stock of said party of the first part, by municipal, county, or other corporations, or by individuals, as authorized by law; the construction of said road to commence as soon as the right of way therefor shall be procured by the said party of the first part, and the necessary subscriptions voted by the counties along the line, and the work shall be prosecuted so as to have the same completed, ready for the running of trains, by the fifteenth day of February,

1878, or as much sooner as can be done by said parties of the second part. Said construction shall be carried on and made in good and workmanlike manner, with timber structures for crossings or trestling, and the track laid with iron rails not less than fifty-six pounds to the yard, lineal, for main track, and fifty-four pounds to the yard, lineal, for side tracks. The equipment shall be such as may be necessary to accommodate the business that may be offered said road on its completion.

"In consideration of the covenants and agreements aforesaid of said parties of the second part, the said party of the first part hereby agrees and binds itself as follows, to wit:

"*First.* That it will procure and furnish to said parties of the second part, free of cost, and in time to complete said road by the period hereinbefore fixed, the right of way of said road, and also such other property as it is authorized by the laws of Kentucky to procure by purchase or condemnation, for any purpose connected with the construction of bridges, embankments, excavations, spoil-banks, or borrow-pits, turnouts, depots, engine-houses, shops, turntables, water stations, or other things necessary to the completion and maintenance of said road.

"*Second.* That it will transfer and deliver to said parties of the second part, or cause to be transferred and delivered to them, all the money, bonds of municipal corporations and counties, or other property or evidences of obligation which have been given or issued, or which may be hereafter given or issued, in payment of any subscription to the capital stock of said party of the first part, or which may have been, or may hereafter be, given by way of donation, including lands, to the said party of the first part, the said transfer and delivery to be made when and as the conditions upon which such subscriptions or donations may be or may have been made are complied with.

"*Third.* That it will, on part payment of the work of construction agreed to be performed as aforesaid by said parties of the second part, issue or transfer and deliver, or cause to be delivered and transferred, to said parties of the second part, or their assigns, all of the capital stock of the said party of the first part issued, or to be issued, except so much as may be necessary to maintain, according to the law of the State of Kentucky, the corporate character and powers of the said party of the first part, and such stock as shall have to be issued in payment for the subscriptions to the capital stock of said party of the first part by the counties and municipal corporations along the line of said road, equalling in no case the amount held by said party of the second part without their consent. Said issue or transfer of stock to the said parties of the second part to be made in proportionate instalments as each or any mile of the track of said road is laid with iron rails, as aforesaid, the said instalments, respectively, to be in the propor-

tion to the whole amount as one mile is to the entire length of the road; and each issue or transfer shall be regularly made on the books of said company, and the certificates for said stock delivered to said parties of the second part or their assigns.

"*Fourth.* That it will, for the consideration aforesaid, further pay to said parties of the second part, or their assigns, the sum of two millions one hundred and ninety thousand (\$2,190,000) dollars, in the coupon seven-per-cent gold bonds of said party of the first part, secured by mortgage or deed of trust, a first lien upon its corporate property and franchises, which said bonds shall be issued in one series, which shall be for two million one hundred and ninety thousand (\$2,190,000) dollars, in the aggregate, and shall be in such form and on such terms and conditions as may be authorized by law and as may be approved by said parties of the second part. The payment of said mortgage bonds shall be made as follows, to wit: The said parties of the second part shall be entitled to receive, if they so desire, two hundred and fifty thousand (250,000) dollars of the first mortgage bonds aforesaid in advance of regular payments, as hereinafter stated, giving accountable receipts therefor, which receipts shall be cancelled on the completion of the road and final settlement of the bond payments. Regular payment of said bonds shall be made absolutely to said parties of the second part, or their assigns, in *pro rata* instalments, respectively, to be in proportion to the whole amount as one mile is to the whole length of the road, except in the purchase of iron rails, when said party of the second part will be entitled to the use of such an amount of bonds (first mortgage) as will be necessary to make such purchase, to use either for absolute payment or as security on time purchase.

"*Fifth.* That it will pay, in further consideration aforesaid, to the parties of the second part, or their assigns, for construction of said road, the bonds of the counties along the line of road issued in payment of the subscription made to the capital stock of the party of the first part, to be not less in amount than one million two hundred thousand (1,200,000) dollars, the deficit, if any, to be paid in cash, or its equivalent.

"*Sixth.* That it will pay, in further consideration aforesaid, to the parties of the second part, in cash, or, in lieu thereof, in an equipment bond, secured by mortgage on the equipment of the road, its earnings, and the road itself, if the legal consent of the stockholders can be obtained thereto, for the sum of one million two hundred thousand (1,200,000) dollars.

"*Seventh.* That it will give and use its corporate credit to aid parties of the second part in purchasing material, or supplying means to carry on the said work, and to that end will issue its notes in the name of said party of the first part, in its corporate capacity, from time to time, as the same may be necessary, and

will deliver the same to said parties of the second part, to be used for the purposes aforesaid; and such obligations, if met by said party of the first, shall be made good by said parties of the second part, and all such notes so issued and delivered to said party of the second part shall be regularly and satisfactorily accounted for.

"*Eighth.* That it further agrees that such parties of the second part have all the earnings of said road during construction until accepted by said party of the first part.

"*Ninth.* That it will maintain its corporate organization, and, through its proper officers and agents, do and perform every act or thing necessary or proper to be performed by it, or in its name, in order to protect the rights and interests of said parties of the second part, their heirs and assigns, as stockholders in said railway company, to the extent as hereinbefore provided, and as may be necessary to conform to the requirements of the laws of the State of Kentucky."

The construction company, represented by Byrne, proceeded to do work in constructing the road, and continued until December, 1873, when it ceased work, through pecuniary embarrassment, and never resumed it, being a creditor of the Great Eastern Co. to a large amount of work done and materials furnished under the contract of May 22, 1873.

On the nineteenth of April, 1878, Frank P. Byrne and John Byrne were, on their own petition, adjudged bankrupts by the district court of the United States for the southern district of Ohio, Frank P. Byrne being described in the petition as "doing business as the Kentucky & Great Eastern Railway Construction Company," and John Byrne as "interested in profits." A. J. Hodder was appointed assignee of the bankrupts, and the proper assignment was executed to him by the register in bankruptcy on the twenty-second of May, 1878.

On the seventeenth of April, 1880, Hodder, as such assignee, filed a petition in equity in the circuit court of Mason county, Kentucky, against the Great Eastern Co., the trust company, the Big Sandy Co., sundry former stockholders of that company, the owners of the interests purchased COMMENCEMENT OF SUIT. under the foreclosure sale of 1869, and sundry judgment creditors of the Great Eastern Co. The *gravamen* of the petition is that the construction company had, under its contract, expended large sums of money, and incurred much debt, in work on part of the line from Maysville to Catlettsburgh, completing about seven miles of it, and purchasing and putting down the iron rails and other materials; that the road and improvements, as far as completed, and all the improvements put upon it by the construction company, are the exclusive property of the plaintiff, and no part of the line and improvements, finished or unfinished, was surrendered or delivered by the construction com-

pany to the railway company ; that the value of the improvements so put into the roadbed and road is \$350,000, and they are of a permanent and fixed nature ; that the plaintiff has a first and prior lien on the entire line of railway and said improvements for the \$350,000 ; that the labor performed and materials furnished and improvements made in the construction of the line of railway by the construction company, under its contract, were on part of the line which the Great Eastern Co. acquired from the Big Sandy Co. ; that at the time the contract of the construction company was made the Great Eastern Co. had possession and exclusive control of the line of railway purchased from the Big Sandy Co., with the consent of that company, and of the defendants who were former stockholders in it, and they knew of the construction contract, and of the improvements which were being made under it, and made no objection, but gave express consent, and are estopped from claiming ownership of the line formerly owned by them, and especially as to the improvements made by the construction company ; that the mortgage to the trust company was made after the Great Eastern Co. had purchased and taken possession of the Big Sandy road, and, as between the trust company and the former stockholders of the Big Sandy road, the trust company has priority, but its mortgage lien, if any, is inferior to that of the plaintiff ; and that the Great Eastern Co. has abandoned work on the road and it is being destroyed. The petition asserts that the plaintiff has a first and prior lien on the entire property of the Great Eastern Co., including road, franchises, rights, privileges, improvements, and everything appertaining to the defendants' property, for the \$350,000 and interest, and especially a first and prior lien on that part of the line on which the labor was performed and the materials were furnished and the improvements were made by the construction company, under its contract, to the value of the same, in case of a sale ; that he has no adequate remedy at law ; and that the Great Eastern Co. is insolvent. The petition prays judgment against the Great Eastern Co. for \$350,000 and interest ; that the plaintiff's claim may be declared a first lien on the road, franchises, and improvements, or a first lien on that part of the line known as the old Maysville & Big Sandy Railroad, and on the funds derived from its sale ; that a receiver be appointed of all the property ; and that the road, franchises, and improvements, and all property involved in the controversy, be sold by the court, and the proceeds distributed as prayed.

On October 28, 1880, the trust company appeared and filed its answer and cross-petition. It sets up that the construction contract was void, because several of the directors of the Great Eastern Co. who voted to authorize its execution, and to ratify it after it was executed, and whose votes were requisite for the pur-

pose, were partners in the construction company. It avers that under the contract, as soon as the materials and improvements were placed on the line of the railway, they became the property of the Great Eastern Co., and the lien of the mortgage to the trust company attached to them and became the first lien on them. It denies the alleged ownership and lien of the plaintiff, and avers that the improvements made were surrendered and delivered to the Great Eastern Co. It asserts a first lien on behalf of the trust company, and the holders of bonds secured by the mortgage, as against the plaintiff, and as against the former owners of the Big Sandy franchises and property, and as against the other defendants on the property and franchises of the Great Eastern Co. and the Big Sandy Co., and on the improvements made by the construction company. It sets up the agreements of July 15, 1871, and January 15, 1873, and avers that, after the first one was made, the Great Eastern Co. began work in good faith on the road from Newport to Catlettsburgh, including all the line of the Big Sandy road, and executed the mortgage to the trust company; and that, under the mortgage which authorized \$2,190,000 of bonds, \$443,000 were issued to persons for materials furnished and work done in and about the building of the railway, and for money procured and expended for that purpose. It alleges that a default in the payment of interest on the bonds has occurred, under the terms of the mortgage, and its conditions have become operative, and the trust company is entitled to have possession of the mortgaged property and to have it sold, to pay the whole amount of the principal and interest due on the bonds issued. It prays that the plaintiff be decreed to have no lien, or one inferior to that of the trust company; that the property, rights, and franchises of the Great Eastern Co., including those of the Big Sandy Co., be sold, and the bondholders be first paid in full; and that a receiver be appointed of all the property. On the same day, the trust company filed in the State court a petition and bond for the removal of the cause into the circuit court of the United States for the district of Kentucky, on the ground of diversity of citizenship, but no transcript of the record from the State court appears to have been certified until December 4, 1880, nor filed in the federal court until two days later, and meantime proceedings went on in the State court.

On the tenth of November, 1880, Wadsworth and others filed in the State court an answer to the petition of Hodder. It alleges that the construction company did not perform the construction contract; that the road and improvements are not the property of the plaintiff; that it is not true they were to remain the property of the construction company till they were surrendered or delivered to the Great Eastern Co. or paid for by it; that the plaintiff does not own and has no lien on any part of the property

or franchises or line or road of the Big Sandy Co., or of any improvements thereon, or on any part of the line of the Great Eastern Co.; that, by the agreement of July 15, 1871, the Great Eastern Co., then having no right to construct a line of railway in the counties of Mason, Lewis, Greenup, and Boyd, and having no line in those counties, arranged with the stockholders of the Big Sandy Co. to buy their stock and property rights in that company, and to construct the Big Sandy line from Maysville to Catlettsburgh; that neither that agreement, nor the one of January 15, 1873, was performed by the Great Eastern Co.; that the construction company had knowledge of the terms of those agreements at the date of the construction contract; that, after the construction company stopped work, the Big Sandy Co. took possession of that part of the line on which the work had been done, and had always been in possession of the rest of the line; and that the Great Eastern Co., after the agreement of January 15, 1873, came to an end, surrendered to the Big Sandy Co. the property on the line of that company. It denies that the Great Eastern Co. is indebted to the construction company. After the transcript of the record was filed in the federal court, Wadsworth and others made a motion to remand the cause, which was denied. The plaintiff then filed a demurrer to the cross-bill of the trust company, and Wadsworth and others and Poyntz filed separate demurrers to the answer and cross-bill of the trust company. In June, 1881, the court sustained the demurrers, and gave the trust company leave to amend the cross-bill.

In the decision on the demurrers (7 Fed. Rep. 793) these points were ruled: (1) It was not necessary that the stockholders of the Great Eastern Co. should authorize the execution of the mortgage to the trust company. (2) The president could legally acknowledge in Ohio the execution of the mortgage. (3) The cross-bill sufficiently averred that the bonds were held by *bona-fide* holders. (4) The application to foreclose was not premature. (5) At the date of the mortgage, the Great Eastern Co. had no right to build the mortgaged road from Newport to Catlettsburgh, unless as a branch of its main stem. (6) There is nothing in the mortgage or the cross-bill indicating that any part of the line mortgaged is a branch of the main road authorized to be built, but the mortgage describes the mortgaged line as the "main line." (7) The Great Eastern Co. had no right to acquire the Big Sandy property without the assent of the holders of a majority in value of its stock, and the cross-bill does not allege such assent. (8) Under the terms of the mortgage and the allegations of the cross-bill, the Big Sandy property was not intended to be mortgaged as future acquired property.

On the twelfth of July, 1881, the trust company filed an amended cross-bill, in which it alleged that the purchase made

by the agreement of July 15, 1871, was made with the consent and approval of the several stockholders of the Great Eastern Co., or a majority in number and interest of them, and was authorized and accepted by them; and that the line of the Great Eastern Railway, as it existed when the mortgage was executed, acknowledged, and delivered, was located and ran through the seven counties in which the mortgage was recorded. The prayer of the amended cross-bill asks that out of the proceeds of sale the unpaid purchase money of the Big Sandy property be paid before the bondholders are paid. On the thirtieth of July, 1881, the plaintiff filed an amended bill, conforming to the equity rules of the federal court, and asking for a reformation of the contract of May 22, 1873, if necessary, so as to make it provide that the construction company be and remain the sole owner of the improvements put on the line of the railroad until paid for. The amended bill also claims a substitution of the plaintiff in the claims of the Great Eastern Co. against the Big Sandy Co. and Wadsworth and his associates, to the amount of his claim.

On the same day the plaintiff demurred to the cross-bill and amended cross-bill of the trust company. On the fifth of September, 1881, the Great Eastern Co. demurred to the same. On the same day the trust company answered the amended bill. On the twenty-ninth of September, 1881, Wadsworth and others and the Big Sandy Co. answered the amended bill, and also the amended cross-bill. There were then exceptions by the plaintiff to the answer of the trust company to the amended bill, and to the answer of the Big Sandy Co. to that bill. All of these exceptions and demurrers were, on hearing, overruled, in December, 1881. On the sixth of February, 1882, the plaintiff answered the amended cross-bill of the trust company. Issues being joined on all the answers, proofs were taken, and the plaintiff's amended bill was taken as confessed by the defendants who had not answered it, including the Great Eastern Co. The cause was heard on pleadings and proofs, and a decision rendered, on which a decree was made August 8, 1882, the material parts of which are as follows: "The case having been fully argued by counsel and submitted to the court, and the court being fully advised in the premises, finds and decrees that no just claim for relief is shown against the Maysville & Big Sandy R. Co., or against the Bank of Kentucky, William H. Wadsworth, John G. Hickman, assignee of Charles B. Coons, John B. Poyntz, Elizabeth Gray, executrix of Hamilton Gray, deceased, C. B. Childs, as shareholder in said Maysville and Big Sandy R. Co., H. L. Wilson, administrator of Harrison Taylor, deceased, as shareholders or part owners of said Maysville & Big Sandy R. Co., or otherwise, or against any of the other defendants, and that said amended bill is dismissed, with costs to be taxed; that no just claim for relief is shown against any of the before-

mentioned defendants, or any of the defendants, under the amended cross-bill of the Farmers' Loan & Trust Co., except or other than as the mortgage asserted in said amended cross-bill may be shown to cover the line of railroad of the Kentucky & Great Eastern R. Co. lying west of the west line of Mason county, Kentucky, and the franchises of said railroad company as organized, as to which excepted property the complainant in said amended cross-bill is allowed time until the next term of this court to make a further showing and prepare for the approval of the court such decrees as he may be advised, but, as to all other claims of relief under said amended cross-bill, it is dismissed, with costs to be taxed; without prejudice, however, to the right of said Farmers' Loan & Trust Co. to bring such other suit, if any, as it shall be advised, to recover any rights of way which may have been acquired by or for the Kentucky & Great Eastern R. Co., for its line of railroad east of the west line of Mason county, other than such rights of way as were acquired by or for the Maysville & Big Sandy R. Co. under its charter, or by the exercise of its franchises, and which rights of way, if any such there are, may be found to be covered and included in the mortgage by said Kentucky & Great Eastern R. Co. to the said Farmers' Loan & Trust Co."

From that decree the plaintiff and the trust company took separate appeals to this court. Since the cases came into this court, Rogers Wright has been appointed assignee in bankruptcy in place of Hodder, and been substituted in the appeals.

The circuit court, in its opinion, on final hearing, reached the following conclusions: Even if the construction contract is valid,

OPINION OF CIR-
CUIT COURT. put upon it, either by that contract, or by possession, or under any statute of Kentucky. The work on the road was not commenced in good faith, within six months from July 15, 1871, under the contract of that date. Neither Poyntz nor the other parties can take advantage of his refusal to unite in the contract of January 15, 1873. Mr. Sands was authorized to make that contract, and the Great Eastern Co. took possession of the Big Sandy property under it. The construction company had actual notice of the terms and conditions of that contract when it entered into the construction contract. The parties making the conditional sale provided for by the contract of January 15, 1873, declared the contract to be void, according to its terms, and re-entered into possession of their property, and their right to do so was recognized by a resolution of the board of directors of the Great Eastern Co.; and as the construction company made its contract with actual notice of the terms and conditions of the conditional purchase from the Big Sandy owners, the construction contract was subject to those terms and conditions, and the construction company and the Great Eastern Co. are bound by them. The

grading, iron, ties, culverts, etc., and all that had become a part of the roadbed of the Big Sandy road, went with it when it was retaken. The plaintiff shows no reason for not enforcing this forfeiture. If the construction company is to be regarded as a distinct company from the Great Eastern Co., having interests adverse to it, then in view of the evidence and of the principles laid down in *Wardell v. Railroad Co.*, 103 U. S. 651, the construction contract should not be enforced. The plaintiff cannot have relief in this suit, even in respect to rights of way which the Big Sandy Co. did not own, or in respect to that part of the track which was relocated. The bill must be dismissed. In respect to the cross-bill, the agreement of July 15, 1871, is shown to have been made with the assent of the holders of a majority of the stock of the Great Eastern Co. If the language of the mortgage embraces the property rights which the Great Eastern Co. had at the date of the mortgage, and those subsequently obtained under the contract of January 15, 1873, still only such rights as the Great Eastern Co. had were conveyed, and the mortgagee took subject to the same conditions as the Great Eastern Co. When the mortgage was made, the contract of July 15, 1871, had become voidable at the option of the Big Sandy owners, the contract of January 15, 1873, was made before any of the mortgage bonds were issued, and the mortgagee took only those rights which the mortgagor had, as against the persons who made a conditional sale of the Big Sandy road. The mortgagee cannot separate the contract of July 15, 1871, from that of January 15, 1873, but must take them as the mortgagor took them. The title was never in the mortgagor, and when the Big Sandy Co. resumed the possession of its property, under the contracts, the mortgagee was bound thereby. If the mortgagee had, within a reasonable time, sought to set aside the forfeiture, and to be allowed the benefit of any enhancement in the value of the property by reason of improvements, this might have been allowed; but as the work stopped in 1873, and the mortgagee could have sought a remedy under the mortgage at any time after that year, the delay has been unreasonable. The delay would not have been so material if the provisions in the contract of January 15, 1873, for re-entry had been made solely to secure the purchase money, but the speedy construction of the road was a reason, if not the chief one, why the original owners retained the right to declare the contract void and to re-enter into possession. As to any rights of way which the Great Eastern Co. obtained along the line of the Big Sandy road, other than those purchased from the Big Sandy Co., although Wadsworth and his associates are not entitled to them, the cross-bill is not so drawn, nor the evidence such that those rights can be subjected to the mortgage in this proceeding.

This comprehensive statement of the conclusions reached by the

circuit court, as indicating the views it took of the facts and the law in this case, may be taken as an announcement of the results at which this court has arrived, in affirmance of the decree of the circuit court in all particulars. It is necessary to add only a few observations. By the terms of the contract of January 15, 1873, the purchase money of the Big Sandy property was to be paid in bonds of the county of Mason, or in cash, within specified times, and on failure to do so, the contract was to become null and void. Mason county never delivered any bonds to the Great Eastern Co., and no payment of bonds or cash was made to the Big Sandy owners. The sale was conditional. No ownership or title passed, and it was expressly provided that, until full payment should be made, no prior lien should intervene on the Big Sandy property, as against the lien of the vendors.

The terms of the construction contract are inconsistent with the idea of any ownership of the constructed road by the construction company, or any lien on it by that company. That company was to have all the money, municipal bonds, and property given or issued in payment of subscriptions to stock, and all stock not necessary to maintain the charter or not issued to municipal corporations for subscriptions to stock, and also the \$2,190,000 of mortgage bonds, secured by the mortgage as "a first lien," and \$1,200,000 in an equipment bond, secured by an equipment mortgage. In other words, it was to have everything except the road, and the Great Eastern Co. was necessarily to have and own that, so as to be able to give a mortgage on it as a "first lien." Nor is there anything in the construction contract suggesting a direct lien in favor of the construction company. The provision for giving to that company all the earnings of the road "during construction," and "until accepted" by the Great Eastern Co. is vague and indefinite, but it cannot be construed as giving a lien, for that would be inconsistent with the whole tenor of the instrument.

Many questions were discussed by counsel at the bar and in their briefs, and we have given attention to all the views and arguments on the part of the respective appellants, but the considerations above stated, on which the case was disposed of by the circuit court, seem to us to be controlling, and to make it unnecessary to say anything further. Decree affirmed.

MATTHEWS, J., did not sit in these cases, or take any part in their decision.

KING *et al.*

v.

ALFORD *et al.*

(Ontario, 9 Ch. Div. 648.)

Held, following Breeze v. The Midland R. Co., 26 Gr. 225 (Proudfoot, J., dissenting), that a mechanic's lien does not attach upon an engine-house and turn-table built for a railway company, and confessedly necessary for the proper working of the railway; and that such engine-house and turn-table, and the land whereon they are erected, cannot be sold under a proceeding for the purpose of enforcing payment of a mechanic's lien.

There is nothing in the Mechanics' Lien Act to indicate that it was intended to be operative to a greater extent than as giving a statutory lien, issuing in process of execution of efficacy equal to, but not greater than, that possessed by the ordinary writs of execution. A mechanic's lien is not analogous to a vendor's lien.

Per Proudfoot, J.—The Mechanics' Lien Act was intended to place mechanics on a more favorable footing than other creditors, and their right ought not to be measured by what could be realized upon an execution. There seems no distinction in principle between their position and that of an unpaid vendor of land.

THIS was an action brought by Eli King and others against J. W. Alford, J. Macnamara, and the Ontario & Quebec R. Co., claiming a declaration that they were entitled to a lien, under the Mechanics' Lien Acts, upon certain land of the railway company for the amount of wages due in respect of work done by them in the erection of a twelve-stalled engine-house and turn-table on the said land.

It was admitted on the trial that \$5615.27 was due on the contract to Alford, who admitted that he owed Macnamara about \$892. It was also admitted that the amounts claimed by the plaintiffs were due by Macnamara, and that the work was done by Macnamara under a sub-contract with Alford, who was the contractor of the railway, and it was not disputed that the lands were essential for the working of the railway.

The learned Chancellor ruled that he was bound by Breeze v. The Midland R. Co., 26 Gr. 225, and that the contractor could raise the question of jurisdiction, as it appeared that the lands were essential for the working of the railway; and he gave judgment for payment into court of \$1220 (being ten per cent of Alford's contract price), and for payment of the balance of \$4395.27 by the railway company to Alford, less the costs of the railway company. He directed that judgment should not issue until the holding of the divisional court, and that if his judgment should be

upheld by the divisional court, then only \$892, less the costs of the railway company and of Alford (both to be paid to Alford), should be paid to the plaintiffs for distribution, and the balance of what was in court should be paid out to Alford.

W. Cassels, Q.C., for the plaintiffs.

C. Moss, Q.C., for defendant Alford.

BOYD, C.—Eaten, V.C., decided in 1862 that no sale of the lands and buildings of a railway could be effected under process of execution. *Peto v. Welland R. Co.*, 9 Gr. 445. This was because the legislature had conferred powers upon railway companies of acquiring property and lands upon the understanding and with the intent that those lands should not be diverted or alienated to any other purpose through a proceeding *in invitum*. That has ever since been deemed well-settled law in this Province. Based upon that no doubt is **MECHANICS' LIEN.** *Breeze v. The Midland R. Co.*, 26 Gr. 225, decided in 1879, when it was held that a mechanics' lien could not be enforced by way of sale against land required for the purposes of a railway. This decision has been hitherto acquiesced in, but we are now invited to review it, chiefly on the ground that this statutory lien is analogous rather to a vendor's lien than to a lien given by judgment and execution. It is a material ingredient of this case that it is found as a fact that the lands (on which are the buildings in question, consisting of a turn-table and engine shed) are essential for the proper working of the railway.

In discussing the nature and effect of mechanics' liens, Pomeroy, in his **SAME—NATURE OF.** *Equity Jurisprudence*, sections 1268, 1269, says that they are enforced by ordinary equitable actions resulting in a decree for sale and distribution of the proceeds identical in all their features with suits for the foreclosure of mortgages by judicial sale. Applying this test, it is evident that the company could not itself subject this kind of lands to any mortgage which would be enforceable by a sale of the *corpus*. *Bickford v. The Grand Junction R. Co.*, 1 S. C. R. at p. 736, 737.

A vendor's lien arises out of the very nature of the transaction and is inapplicable to a lien created by the statute for work and materials done and furnished in order to erect buildings on land. **VENDOR'S LIEN.** The vendor is considered not to have parted with his interest in and dominion over the subject of purchase till he has received payment of its price, and he is therefore permitted to follow the land itself (with certain restrictions) until he obtains satisfaction for its value. The act itself rather indicates an analogy with proceedings by way of execution (see R. S. O. c. 120, s. 12), but I do not lay stress upon this.

The general principle laid down in *Phillips on Mechanics' Liens*, s. 179, applies here. He says: "Property which is exempt

from seizure and sale under an execution, upon grounds of public necessity, must, for the same reason, be equally exempt from the operation of the mechanics' lien law, unless it appears by the law itself that property of this description was meant to be included; and, to warrant this inference, something more must appear than the ordinary provisions that the claim is to be a lien against a particular class of property, enforceable as judgments rendered in other civil actions." Now railways generally are in these days essential to public use and convenience, and they are therefore protected on grounds of public policy from being cut in pieces and destroyed by sales under legal process. This particular road is indeed specifically designated by the legislature which created it as one "of great public advantage," as being "for the general advantage of Canada" (44 Vic. ch. 44 (D) Preamble, SCOPE OF LIEN ACT. sec. 1). There is nothing in the scope of the act as to liens to indicate that it was intended to be operative to a greater extent than as giving a statutory lien issuing in process of execution of efficacy equal to but not greater than that possessed by the ordinary writs of execution. I do not think the law as interpreted by *Breeze v. The Midland R. Co.* should now be changed, and therefore the judgment should be affirmed, with costs.

PROUDFOOT, J.—The sole question in this case is, whether or not a mechanics' lien attaches upon an engine house built MECHANIC'S LIEN for a railway company.

The language of the statute R. S. O., c. 120, s. 2, STATUTE. subs. 2, and c. 1, s. 8, subs. 13, is wide enough to render the property of any owner, corporate or otherwise, liable to the lien.

On the one hand it is argued that property which is exempt from seizure and sale under an execution, upon grounds of public necessity, must for the same reason be equally EXECUTION AND MECHANIC'S LIEN COMPARED. exempt from the operation of the mechanics' lien law, unless it appears by the law itself that property of this description was meant to be included; and, to warrant this inference, something more must appear than the ordinary provision that the claim is to be a lien against a particular class of property, enforceable as judgments rendered in other civil actions; and there are many instances in the American courts where public school-houses have been held not to be affected by the lien, and it is said it could not be the intention of the legislature in any case to subject a county to the privation or loss of its buildings such as court-houses, public offices, or jails, so indispensably necessary for the public benefit and accommodation, as also for the preservation of the public records containing the only evidence that thousands may have for their rights, and in which every individual of the community has a deep interest. Phillips on Mechanics' Liens, 2d ed., ss. 179,

179*a*. And the general rule formulated from this class of decisions is, that the right of a mechanic to a lien is no higher than that of an execution creditor. And that, as it has been decided that a railway cannot be sold upon an execution, it and its property is not affected by this lien. *Peto v. The Welland R. Co.*, 9 Gr. 455; *The Erie & Niagara R. Co. v. The Great Western R. Co.*, 19 Gr. 43.

It is reasonable that there should be some qualification of the right to a lien in regard to public school buildings, and other buildings of a public character, and belonging to the public, such as court-houses, jails, registry offices, etc., and it may perhaps be found that under our statute they are not subject to the lien. But the rule deduced from this class of cases is much wider than these cases warrant. A rule applicable to public property is not necessarily applicable to private property; and it might well be held that public buildings are exempt, while railway property is not. The reasons for the exemption in the one case, the public interest, do not apply, or apply only in a very modified degree, to the other.

The same unanimity of opinion in regard to the exemption of railways does not exist in the American courts as in regard to public buildings. Where the railway has been built by the State, it would be subject only to such liability as other public property. But where it is built by a corporation for private benefit, worked for private benefit, and the profits divided only among stockholders, the case is entirely different. The public are interested in having the road kept in operation, as affording easier and speedier modes of transit, but have no interest in the road itself or in the dividends to be derived from it. The property is private property. The question has been ably discussed in many American cases, collected in Mr. Phillips' book (*Mechanics' Liens*, 2d ed., s. 180 *et seq.*). In some instances the railways have been held exempt. Language of this kind is used: "After a State has assumed an immense responsibility in building a railroad for the public use and convenience, it would be unreasonable to suppose a power remained in any individual to deprive the public of the benefit contemplated by it." In such a case the road is public property. The distinction is well marked in *McPheeters v. Merrimac Bridge Co.*, 28 Mo. 465, where it is said: "Because bridges, which are public highways, cannot be subject to the liens of mechanics, it does not follow that there may not be bridges which will be subject to them. We have seen there are such things as private bridges known to the law" (at p. 458).

Where the railroads have not been built by the State, and where in fact the constitution of the State prevented it from engaging in such enterprises, as in Wisconsin, the rules applicable to any other private property have been applied. In the case of *Hill v. La Crosse & Milwaukee R. Co.*, 11 Wis. 223, it was held that

depot buildings of a railroad company were liable to the lien. The court say, at p. 233, if a railroad company purchase land for a depot building, and at the same time execute a mortgage to secure the purchase money, "there can be no conceivable reason of public policy that should prevent the enforcement of such specific lien by means of which the company had acquired the very property itself. And we can see no distinction, upon principle, between allowing such a lien to be created by the mortgage of the company, and allowing it to be done by the force of the statute. A building built for a railroad company is as clearly within the letter and spirit of the statute as any other building."

In the present case the railway was not a public work in the sense of belonging to the public, it was not built either by the Dominion or the Provincial Government, it was purely a private enterprise.

The statute was intended to place mechanics on a more favorable footing than other creditors. General creditors had a right to sue for their debts upon the common-law liability of the company, but they had no specific charge. INTENT OF STATUTE. Mechanics were given a specific lien on the property. Their case is not the same then as that of general creditors, and their right ought not to be measured by what could be realized upon an execution. The true gauge of their right, I think, is that which the name expresses, a lien, and their remedies such as a lien-holder might enforce, and it is immaterial whether the lien be created by mortgage or contract, or imposed by statute. There seems no distinction in principle between their position and that of an unpaid vendor for land sold to the railway, and it has AUTHORITIES CONSIDERED. been settled by numerous decisions that to enforce such a lien an order may be made for the sale of the railway. *Wing v. Tottenham, etc., R. Co., L. R. 3 Ch. 740; Slater v. Canada Central R. Co., 25 Gr. 363.*

Breeze v. The Midland R. Co., 26 Gr. 225, is very shortly reported, and I do not know the reasons for the decision; but I do not agree with the decision.

In *Bickford v. Grand Junction R. Co., 1 S. C. R. 696*, the power of corporations generally to mortgage and charge their property is stated in very full terms. With regard to railway companies, it was inquired whether the mortgage in that case was inconsistent with any statutory destination of the property of the company subject to the mortgage. It was not necessary to decide that the permanent way, station houses, and station grounds actually required for the use of the railway, could not be mortgaged for the purposes of the railway, for the railway company had other lands which it was held they clearly might mortgage. The court assumed for the purpose of the judgment that the permanent way could not be mortgaged, but held the mortgage good

as to the other lands. And the single question there was, as to the validity of the mortgage, and the nature and extent of the remedies were not discussed (p. 734). So that but little aid can be got from this case towards the solution of the question. The short sections, 1268, 1269, of Mr. Pomeroy's book are very general in their terms, and do not refer to railway liens or securities at all.

I cannot readily conceive any material distinction between the lien of a vendor and the lien of a mechanic. The vendor is considered not to have parted with his interest till paid for the land, a conclusion arrived at upon equitable principles, independent of any law sanctioning it. But our statutes give the mechanic a lien from the very commencement of his work—every brick or stone put into this engine-house was secured by a lien as soon as it was laid. And the building was as essential for the use of the railway as the land upon which it was erected. It is a lien paramount to any contract,—does not depend upon agreement, and ought not to be governed by the rules applicable to enforcing agreements.

Mr. Moss referred us to the Dominion Statute 44 Vic. c. 44, incorporating the railway for which the work was done. The preamble declares that the construction of the railway would be of great public advantage, and form a most valuable line of communication for national defence, and be for the general advantage of Canada. But I do not see how that can affect this question. It is still a private undertaking, and of many others, such as the establishment of manufactures, it might be predicted that they were for the general advantage, but there is nothing to show that the Parliament intended to relieve the company from the payment of their debts. It no doubt still left a vendor's lien untouched, and I think the present is in the same position.

The judgment should be accordingly.

FERGUSON, J.—The question for determination in this case seems to be, whether or not the lands of a railway company upon which they have erected their engine-house, confessedly necessary for the proper working of the railway, can be sold under a proceeding for the purpose of enforcing payment of the amount of a mechanics' lien.

In the case *Slater v. The Canada Central R. Co.*, 25 Gr. 363, it was decided that when lands are taken possession of by a railway company under the powers conferred upon them by the act, the court will not order the possession to be restored in case of default in payment of the amount of compensation accorded to the owners, and it was held that the proper remedy was a sale of the land. Near the conclusion of his judgment the late chief justice, then the chancellor, referring to the case *King v. The Tottenham & Hampstead Junction R. Co.*,

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L. R. 3 Ch. 740, said that case settled the question that where there is a vendor's line the parties are entitled to enforce it in the way any other lien can be enforced; that is, by a sale. In the case referred to Lord Justice Selwyn, at the conclusion of his judgment, said: "I have no hesitation in saying that the whole practice of the court shows that a vendor of land to a railway company is with respect to his lien in no different position from a vendor of land to any other person."

The lien of the vendor, it is said, is wholly independent of any possession on his part, and it attaches to the estate as a trust equally whether it be actually conveyed or only contracted to be conveyed. It is said that the principle on which courts of equity have proceeded in establishing this lien in the nature of a trust is simply that a person who has gotten the estate of another ought not in conscience, as between them, to be allowed to keep it and not pay the full consideration money. See Sugden's Vend. and Purch., 8 Am. ed. 671, note *d*, and cases there referred to.

In *Peto v. The Welland R. Co.*, 9 Gr. 455, it was held that a judgment creditor of a railway company with an execution against the lands of the company lodged in the hands of the sheriff, is entitled to the appointment of a receiver of the earnings of the road, the profits thereof to be applied in payment of his demand, but that no sale of the lands and buildings of the railway could be effected under process of execution. This case is, as I understand, undisputed law at the present time. The decision was apparently placed on the grounds of public policy. In the case *Gilman v. Brown*, 1 Mason (C. C. U. S.), 191, at p. 221, Mr. Justice Story said: "The lien of a vendor for the purchase money is not of so high and stringent a nature as that of a judgment creditor, for the latter binds the land according to the course of the common law, whereas the former is a mere creature of a court of equity, which it moulds and fashions according to its own purposes."

From these authorities it would seem that a vendor, though his lien is not of so high or stringent a nature as the line or charge of a judgment creditor, can have the lands and buildings of a railway company sold for satisfaction of his purchase money, when the execution creditor cannot have them sold for satisfaction of his debt, and it appears to me that this can only be because a court of equity will execute the trust in his favor. The claim of the vendor by virtue of his lien seems to be of a nature quite different from that of an execution creditor.

The lien-holder under the provisions of the Mechanics' Lien Acts, it may be contended, has a lien given him directly by statute, and that, for this reason, his right is of a higher and more effective character than that of the execution creditor. It will be found, I think, that in this country the rights of the execution creditor against the lands of his debtors

STATUTE. ME-
CHANICS' LIEN
AND VENDORS'
LIEN.

is given him by statute law, and, I think, much more closely resembles, in kind, the right of a holder of a mechanics' lien than does the latter resemble in kind the vendor's lien, and I do not see that the fact that the lands of a railway company may be sold for the purpose of satisfying a vendor's lien affords any sufficient ground for saying that they should be sold for the satisfaction of a mechanics' lien when they could not be sold to satisfy the claim of an execution creditor, who, from the time of the placing of his writ in the hands of the sheriff, has a lien upon the lands of his debtor. Counsel contended that the vendor's lien furnished the analogy in this case that must govern.

The vendor's lien is in the nature of a trust. It is a trust. Neither the mechanics' lien nor that of an execution creditor is such a trust. The vendor, before sale, had the estate in the land, and it is because the purchaser cannot in equity have both the land and the purchase money that this lien in the nature of a trust arises. Neither the holder of the mechanics' lien nor the execution creditor had the estate in the land, and there is no room for such a trust arising. Each has a lien upon the land, but not at all the same, in kind, as the vendor's lien, and, with all respect for the argument, I do not think the contention can prevail.

In the case *Breeze v. The Midland R. Co.*, 26 Gr. 225, the bill was filed to enforce a mechanics' lien for work done upon a station house of the defendant, the railway company, and the cause was heard *pro confesso*. The judgment of the learned judge was short. He said: "I do not think that you are entitled to that relief as against the land of a railway company required for the purposes of their railway. The only decree I can make is: one for the payment of the amount due, with costs." The decision was in 1879, and has, I believe, ever since been acquiesced in. I do not perceive any reason for saying that it is not good law, on the contrary I think it is; and I think the judgment should be affirmed, with costs.

Mechanics' Liens against Railroad Property.—See *Comm. of Buncombe Co. v. Tommey*, 20 Am. & Eng. R. R. Cas. 495; *St. Louis, etc., R. Co. v. Memphis, etc., R. Co.*, 6 Id. 600; *Knapp v. St. Louis, etc., R. Co.*, 7 Id. 394.

Construction of Mechanics' Lien Law, Liberal.—Machinery employed in making Artificial Stone used, not within.—Though the mechanics' lien law is liberally construed, the courts have no power to extend it to cases beyond the obvious designs and plain requirements of the statute. The contractor for the building of certain bridges for the defendant corporation purchased certain machinery of the appellant, said machinery being used in the manufacture and transportation of the artificial stone used in the construction of the piers of said bridges. *Held*, that the machinery is not within the meaning of the mechanics' lien law; and that the law extends in favor of material-men only to such materials as ordinarily enter into or are used in the construction, and which are fairly within the express or implied terms of the contract between the owner and the contractor. *Basshor v. Baltimore & O. R. Co.*, 3 Atl. Rep. 235.

Mechanics' Lien—Railroad Bridges—Entire Contract.—Railroad bridges are within the mechanics' lien act of May 4, 1877 (74 Ohio L. 168). But see *Rutherford v. Railroad Co.*, 35 Ohio St. 559. A contract providing for the building of all of the bridges upon the line of a railroad between two specified points, the number of bridges not being specified, is held to be an entire contract for the purpose of obtaining a lien under said act. *Smith Bridge Company v. Bowman*, 41 Ohio St. 37.

Mechanics' Lien—Notice and Claim as Prerequisites—Limitation.—The statute conferring mechanics' liens is liberally construed, but not so as to extend beyond its terms, true intent, and meaning.

The notice and claim of lien, required by the statute, are prerequisites to its creation and enforcement. An item not embraced within the claim and notice cannot be allowed. *Texas, Santa Fé & Northern R. Co. v. Orman*, 9 West C. Rep., 269 (Sup. Ct., New Mexico, Jan., 1886).

Director is an Officer upon whom Mechanics' Lien Notice may be served.—A director of a railroad corporation is an "officer" within the meaning of a statute requiring notice of a mechanics' lien to be served on the officers of such corporations.

Under "An act to secure pay to persons performing labor or furnishing materials in constructing railroads," passed March 31, 1874 (71 O. L. 51), which provides that "any person performing said labor or furnishing said materials, who has not been paid therefor, shall serve a notice in writing upon the secretary or other officer or agent of said railroad company,"—it is sufficient to serve said notice on a director of the company to be affected thereby.

It is the design of the act to facilitate the methods by which the laborers and material-men chiefly affected by it are to secure their claims by charging the companies with them, and it is entitled to such reasonable and liberal construction as will best carry out its purpose. *Railway Co. v. Cronin*, 88 Ohio St. 127; *Barnes v. Thompson*, 2 Swan (Tenn.) 315; *Buck v. Brian*, 3 Howe (Miss.), 880; *Phillips Mech. Liens*, § 16.

In view of the fact that the corporate powers, business, and property of such corporations must be exercised, conducted, and controlled by the directors thereof (sec. 3248, R. S.), there can be no question that a director of such a corporation is an "officer" of it. *Railway Co. v. McCoy*, 42 Ohio St. 251.

Construction Contract—Lien of Contractor.—Where a construction contract for building a railroad was set aside, at the instance of the railroad company, as *ultra vires*, with an allowance of compensation to the contractor for work actually performed by him, *held*, that for the sum so allowed him he was entitled to a contractor's lien under the Pennsylvania statute—the resolution of January 31, 1848. *New Castle N. R. Co. v. Simpson*, 26 Fed. Repr. 183 (Penna., Jan., 1886).

LOUISVILLE AND NASHVILLE R. Co.

v.

HOLLERBACH.

(*Advance Case, Indiana. February 18, 1886.*)

A construction contract provided that certain preliminary work should be prepared by the employer. The contract was to be completed by a fixed time. The contractor expended money in preparing for the execution of his part of the labor, but the employer negligently failed to have the preliminary work done at the proper time, by reason of which the contractor suffered damage. He gave the employer due notice that the delay would occasion him damage for which he should hold the employer liable.

Held—1. That the employer could not, by negligently failing to proceed with his part of the work, impose upon the contractor the election between the burden of carrying the material prepared until it should suit the employer to proceed, or of abandoning his contract.

2. That the contractor could proceed with the work when the employer's part thereof had been completed, and recover the contract price therefor, together with damages for any direct loss which he had suffered by reason of the defendant's unreasonably suspending the work.

3. That the allowance of six per cent interest on the sum which the contractor had invested during the time which the work was suspended by the negligence of the employer was proper.

APPEAL from Vanderburg Circuit Court.

S. B. Vance for appellant.

G. A. De Bruler and *D. B. Kumler* for appellee.

MITCHELL, J.—On the twenty-fifth day of July, 1881, a written contract was made between the Louisville & Nashville R. Co. and Archibald Hollerbach for the construction by the latter of two stone T (tee) abutments at Pigeon creek, on the St. Louis division of the Louisville & Nashville R., in the city of Evansville.

The material provisions of the contract are as follows: (1) That Hollerbach should furnish all the material except cement and sand, and build the abutments according to plans and specifications furnished by the company, the specifications to form part of the contract. (2) That the stone should be obtained from the Cannelton quarries, in this State, and be taken from the quarries to the bridge-site at the expense of Hollerbach; but if the water in Pigeon creek should become too low for the use of barges, the company should furnish cars to transport the stone from the river to the bridge-site, but that he should load it on the cars and unload it at the bridge-site promptly. (3) That the company should furnish the foundations and the cement and sand, and that the job should be completed by the twentieth day of November, 1881. (4) The com-

pany was to pay him \$9.20 for each cubic yard of stone laid in the abutments off of barges at the bridge-site, and \$9.95 for each cubic yard of stone laid in the abutments off of cars at the bridge-site.

(5) The payments were to be made as follows:

"Estimates of masonry laid will be made at the end of each month, and from the estimate twenty per cent will be retained until the whole job is completed, when a final estimate will be made at the above specified rates, and all previous estimates deducted therefrom."

Pending this contract the benefit of it was assigned by Hollerbach to Simeon Jaseph. The abutments were completed in the spring of 1883, and this suit was brought by Hollerbach to recover of the defendant a balance alleged to be due for the work, as by the contract, and also to recover damages for certain breaches of the contract therein alleged. Jaseph was made a defendant because of the assignment, which is alleged to have been only as collateral security for certain advances claimed at the date of the suit to have been repaid him.

The complaint was in two paragraphs. After alleging the execution of the contract, the substantive grounds of complaint in the first paragraph are as follows:

(1) That under the contract the plaintiff proceeded to construct the piers, and finally constructed them to the approval of the superintendent of bridges of the defendant, putting into the piers, from stone unloaded from cars, 1691 cubic yards of the value, according to the contract price, of \$16,829.45; that the plaintiff, at the special instance and request of defendant, put into the piers work, material, and labor to the amount of \$150, which was extra, and in no way contemplated by the terms of the written contract.

(2) That, according to the terms of the contract, the defendant was to prepare the foundations of the work ready to receive the masonry to be furnished and constructed by the plaintiff by the twenty-fifth day of July, 1881; but that although the plaintiff was ready with his tools, machinery, hands, material, barges, and other things necessary for the construction of the piers at the time fixed in the contract, yet the defendant wholly neglected and refused to prepare the foundations, as it had agreed to do, until the lapse of 15 months after the time it had fixed; that by reason of the failure of the defendant to perform its part of the contract in the preparation of the foundations the plaintiff was greatly injured and damaged in this: (1) That he was compelled to pay out and expend, and did pay out and expend, in extra handling of stone, made necessary by the delay in the preparation of the foundations, the sum of \$2400; that by reason of this delay he was compelled to unload his material from the barges onto the river bank, and then reload onto the barges, and reload on the railroad cars, to his great damage. (2) That he was further greatly injured and damaged by

the delay of the defendant in this loss of time of plaintiff and of non user of ropes, blocks, derricks, and other tools and machinery, loss and destruction of material, and wear and tear and injury to ropes, blocks, derricks, and other tools and machinery, by reason of exposure and the delay in the use of material which he had furnished and paid for, being interest on \$5500 for 15 months,—in all the sum of \$2500.

(3) That by the terms of the contract the defendant agreed to furnish to the plaintiff all the cars necessary for the fast completion of the work, upon application of plaintiff, so that plaintiff should not be hindered in the work for want of cars; that after the foundations were completed, and the plaintiff began the construction of the piers, he repeatedly made application to the defendant for cars for the transportation of stone to the bridge-site, and defendant failed, neglected, and refused to furnish plaintiff cars, by which he was greatly delayed in the work, that is to say, for 100 days, to his damage \$1500.

It is averred that the defendant paid to the plaintiff on account of the contract the sum of \$11,000, "or thereabouts," and that there is still due him on the contract, and for damages on account of the default of the defendant, the further sum of \$11,000 which the company refuses to pay.

The second paragraph contains the following additional grounds of complaint:

(1) That the defendant was, by the terms of the contract, to furnish the foundations for the abutments according to the plans and specifications submitted at the time of making the contract, which were part of the contract; that defendant failed to construct the foundations according to the plans and specifications in this: that the stems of the abutments were shortened two feet after the stone therefor had been delivered, at a cost of seven dollars per cubic yard, and that the shortening of the stems necessitated a great waste of stone which had been prepared and delivered, and which had to be chipped off, in all 90 cubic yards, of the value of \$800, and to the damage of this plaintiff \$800. (2) That by the terms of the contract, and changes made in the construction of the abutments, they were finally completed of a height of 18 inches less than required by the plans and specifications, by which the plaintiff was damaged in preparing and delivering 33 cubic yards of stone of the value of \$250, to his damage \$250.

The defendant moved the court for an order requiring the plaintiff to separate so much of his complaint as sought to recover for work done in pursuance of the contract into one action, and so much thereof as counted upon damages for the defendant's default into a separate action. This motion was overruled, and the ruling excepted to, but no question is made upon this ruling here. Pending the suit an order was made, by agreement of parties, to

the effect that the railroad company should pay to Simeon Jaseph the sum of \$3037.10, whose receipt therefor, according to the order, should be an acquittance to the company for that amount, but as against Jaseph and Hollerbach, and that such payment should be without prejudice to Hollerbach for any sum which he claimed in excess of that amount from the railroad company.

The defendants answered in five paragraphs, but as it is not material to any question to be considered, the answer is not further noticed. It took issue with all the material averments in the complaint.

The cause having been submitted for trial to a jury, a verdict in favor of plaintiff for \$3397.33 was returned. The overruling the motion for a new trial is the only error assigned here. This assignment brings in question the ruling of the *nisi prius* court in admitting certain evidence, in giving, refusing, and modifying certain instructions, and whether or not the verdict is sustained by sufficient evidence.

QUESTIONS TO BE
CONSIDERED.

The case as presented is to a degree unusual in its character, and we have had some difficulty in determining the principles which should be applied to it, owing in a measure to the form in which the action is brought. It will be observed that in both paragraphs the making of the contract is averred, and that "under said contract" the plaintiff proceeded to construct the abutments to the approval of the defendant's engineer. The *gravamen* of the action is to recover on the executed contract the stipulated price of the work specified therein, and for extra work not embraced in the contract, in addition to which damages are claimed for certain specified breaches of the contract on the defendant's part, which it is claimed resulted in loss to the plaintiff. The appellant insists that the plaintiff's right of recovery, he having completed the work, as it is alleged in his complaint, under the contract, is limited to the contract price; and that because he proceeded under the contract to the completion of the work he can recover no damages which may have resulted from the delay occasioned by the default of the railroad company. In support of this contention *Bush v. Chapman*, 2 G. Greene, 549, and *Western Union R. Co. v. Smith*, 75 Ill. 496, are relied on.

The case first cited was an action on a special contract, by which it was agreed that Chapman should do the millwright work for a flouring-mill for Bush. The latter was to furnish all the materials, and Chapman was to do all the work, and have the mill ready for grinding by the first day of the ensuing October, in consideration of which he was to be paid a certain price in stipulated payments. It was averred that the plaintiff was ready and willing to perform the work according to the agreement; that the defendant failed to furnish materials so as to enable him to complete the work at the time agreed upon, but that the

CASES RE-
VIEWED.

plaintiff nevertheless did complete the work by the first day of February of the year following. The declaration proceeded to specify the manner of the failure, and the injury sustained thereby, and claimed damages. The court says: "By asserting the binding effect of the special contract, claiming the benefit of it, and making it the *gravamen* of his action, he [plaintiff] is precluded from the recovery of any damages for delay," etc. The case is decided upon the authority of *Shaw v. Turnpike Co.*, 3 Pen. & W. 445. This last case proceeds upon the theory that a party to a special contract may not silently treat it as subsisting until the work contracted for is completed and then attempt to recover upon a *quantum meruit*.

The case of *Western Union R. Co. v. Smith*, *supra*, was an action by a contractor for the building of a section of railway to recover damages on account of the failure of the railroad company to furnish materials seasonably, so that the completion of the contract was extended into the winter season, and the work was thereby rendered more difficult and expensive. In the course of the opinion in that case it was said: "When the company failed to furnish the iron necessary to complete the work within the time limited, appellee had the right to abandon the contract and refuse to proceed further. . . . If appellee simply resumed track-laying as soon as the company obtained iron, without any further arrangement or understanding, the reasonable presumption would be that he was intending to perform the labor under the agreement." It was held that the contract furnished the measure of compensation, and that extra compensation could not be recovered because the execution of the work was rendered more expensive by the delay of the employer. It may be doubted, however, whether the authority of the case last cited is not impaired by the later case of *Tobey v. Price*, 75 Ill. 645.

Yielding our assent to the cases cited, so far as they hold that a contractor who proceeds without explicit notice, or a new agreement, to the completion of work specially contracted for will be presumed to have done so under the special contract, we are nevertheless of opinion that when the execution of such a contract, within a limited time, is dependent upon something essential, which is to be performed by the employer, the default of the employer, resulting in damages to the contractor, may render the former liable for such damages notwithstanding the latter has not abandoned the contract. While it is true the contract, so long as it is treated as subsisting, must be looked to as furnishing the exclusive measure of compensation for the work done, we think in common fairness the actual damages which have certainly resulted from the neglect and default of the employer, and which may reasonably be supposed to have entered into the

EFFECT OF THE
CONTRACT.

contemplation of the parties, should not fall on the contractor. If it were otherwise, a contractor might invest the whole of his available means in necessary initial preparations to carry out an extensive contract.

If the employer suspends the execution of the contract by negligently failing to proceed with his part of the work, can he thereby impose upon the contractor the election between the ruinous burden of carrying the material prepared until it suit the convenience of the former to proceed, or abandoning his contract and awaiting the dilatory process of litigation to recover damages? We think there is no rule of law which requires the infliction of such injustice. Where a contractor in good faith enters upon the performance of a contract, and incurs expense on account thereof, the employer, having notice of that fact, if the employer, either by an order, or by negligently failing to perform an essential part to be performed by him, suspends the execution of the contract, upon a resumption and completion of the work it will be implied that all loss necessarily occasioned by such suspension, of which the employer is at the time notified, shall fall upon him. The contractor may not acquiesce in the suspension in silence, and upon the resumption and completion of the work claim the contract price and damages for that which may have occurred with his acquiescence. But if notice be given of his readiness and willingness to prosecute the work to completion within the time agreed upon, and that its suspension will involve him in loss, we can discover no principle upon which it can be held the loss must fall upon the contractor in case of a voluntary resumption of the contract. That it does not we think is maintained by the following authorities: *Tobey v. Price*, 75 Ill. 645; *Fitch v. U. S.*, 8 Ct. Cl. 319; *Harvey v. U. S.*, Id. 501; *U. S. v. Behan*, 110 U. S. 338; *U. S. v. Speed*, 8 Wall. 77; *Koon v. Greenman*, 7 Wend. 121; *Merrill v. Ithaca, etc., R. Co.*, 16 Wend. 586; *Railroad Co. v. Howard*, 13 How. 344.

The case of *Harvey v. U. S.*, *supra*, arose out of a claim filed against the government for suspension of work on a contract for the erection of bridge piers for the Rock Island bridge. Under the contract it became the duty of the government to determine the location of the bridge and adopt a general plan for its erection. The work was suspended by reason of the failure of the officer intrusted with its supervision to determine the location and furnish plans. It was held that this furnished no excuse for delaying the contractors in the prosecution of the work they had undertaken. It was there declared that the rule of damages was the same *pro tanto* as in cases where the defendants wrongfully put an end to the fulfilment of the contract, viz., the direct and actual loss which the contractor sustained.

CONTRACTOR'S
RIGHT TO RE-
COVER DAM-
AGES.

With this statement of general principles, we may now consider the case in hand. The contract embraced the construction of work of such magnitude, within a time so limited, as that it became the right and duty of the plaintiff to employ such means as would reasonably be expected to accomplish the work within the time limited. It may have been that, to a considerable extent, energetic action and vigorous prosecution of the work were depended upon largely to secure profits from the contract. That the work might not be retarded, the defendant owed the reciprocal duty to prepare the foundations upon which the abutments were to rest with due diligence. The evidence tends to show that the plaintiff within a few days after the execution of the special contract took the initiatory steps to execute the work. He proceeded with a force of about forty stonecutters, quarrymen, etc., to quarry and shape the stone to suit the specifications as furnished him. He procured, and put in place soon after, the necessary derricks, ropes, guys, and other appliances for prosecuting the construction of the piers. The evidence tends to show that by corresponding diligence the defendant might have prepared the foundations within a period of twenty or thirty days from the date of the contract. Neglecting its opportunity, an oncoming freshet delayed the foundation for a twelvemonth or more.

Having, as the evidence tended to show, expended from six thousand to eight thousand dollars in preparing material ready to be laid in the piers, the plaintiff, on the twenty-sixth day of November, 1881, six days after the time limited for the completion of the contract, gave the defendant's superintendent substantially the following written notice:

"SIR: The time fixed upon in my contract with the Louisville & Nashville R. Co. for the erection of two T abutments on Pigeon creek, in the city of Evansville, has now expired, and the abutments are not completed. My failure to complete them in time is caused by the railroad company failing to perform its part of the contract, in this: failing to prepare the foundations in time to allow the completion of the masonry, neither of the foundations being yet ready. I have now quarried, and cut at the quarries, near Cannelton, and have had for forty days past, some twenty-two hundred yards of stone prepared especially for the abutments. I also have had for some time piled under derrick at bridge-site a sufficient amount of stone to have commenced work, but have been compelled to delay for the reason given. As the material is cut and ready, and derricks are up at bridge-site, block and tackle being damaged by being out in the weather, I ask for an estimate of six thousand dollars on material, so as to enable me to pay indebtedness incurred in procuring material. I also ask a modification of the contract so as to give me additional estimates on material at bridge-site from time to time sufficient, with amount asked above, to make seventy-five per cent of value of material placed there."

To this the defendant, by its superintendent, responded, in substance, that the company could not possibly allow estimates on ma-

terial not in its possession; saying, further, that if plaintiff would deliver stone at bridge-site the company would advance money on it. Thus encouraged, the plaintiff, at great additional expense, procured a large quantity of stone to be freighted from Cannelton, a distance of some eighty miles. The evidence tended to show that he then had invested in stone, freight, etc., between nine and ten thousand dollars. Some time in January he was allowed an estimate of \$2800. The company declined to make any further advances, except as the stone was laid in the piers according to contract. The foundations were not ready until the twentieth of September, 1882. On that day work was resumed.

The plaintiff was permitted, over the defendant's objection, to show the cost of transporting the stone from the quarries to the bridge-site; and in this state of the case the court instructed the jury, in substance, that if they found from the evidence that the plaintiff, in good faith, proceeded after the execution of the contract to get out stone, and to perform his part of the contract, and was ready and able to have constructed the piers according to the contract if the foundations had been prepared in time, and that the foundations were not prepared until after the twentieth of November, 1881, then the plaintiff was entitled to recover as damages interest at the rate of 6 per cent on the amount actually invested by him in getting out stone and preparing to perform the contract, for such time as he was delayed by the failure of the defendant. The admission of the evidence and the giving this instruction are complained of.

RULINGS OF
COURT BELOW.

Within the principles already stated, we think the defendant had no reason to complain of the rulings of the court in respect of either the evidence or the instruction. The defendant having been notified of the exact situation in which the plaintiff was placed, the loss on his investment having been occasioned, as the instruction assumes, by the default of the defendant, it could not reasonably require him to carry the material and expense of preparing it without compensation. We have found no case in all its features identical with this, nor do we know of any formulated rule applicable for the measurement of damages in an analogous case. The law aims to compensate for actual loss. We cannot think that the allowance of 6 per cent interest on the money actually invested during the time the work was suspended by the defendant is an unreasonable compensation. Whether the amount allowed by the jury as interest was correct or not depends upon the computation made by them. As there is nothing in the record indicating the amount thus allowed, and nothing from which we can say the computation was wrong, we must assume that whatever sum was allowed as interest was correct.

MEASURE OF
DAMAGES.

The court admitted evidence tending to show that after the stone

had been prepared with which to construct the piers according to the specifications originally adopted, the plan was changed by the defendant, and that the change involved expense to the contractor in reshaping some of the stone according to the new specifications. This was objected to, and it is now claimed that the proof showing the cost of recutting stone rendered necessary by the change is a variance from the claim made in the second paragraph of the complaint. We think this evidence was admissible. It is averred that by reason of the shortening of the stems of the abutments after the stone had been prepared the stone had to be "chipped off," to the plaintiff's damage. This averment was sufficiently definite to admit the evidence in support of recutting the stone.

By the third instruction the jury were told, in substance, that if changes in one of the piers became necessary by reason of a mistake of the defendant's engineer, the cost of making such change, if it was made by the plaintiff, might be recovered by him. It is contended that this instruction was outside of the case as made by the complaint. We are of the opinion that this contention is not maintained by the record. It is averred in the second paragraph of the complaint that by reason of "changes made in the construction of said abutments the same was finally completed of a height eighteen inches less than required by the plans and specifications," involving an additional expense to the plaintiff. This averment is uncertain. It does not appear whether the changes were made by mistake, or, if by mistake, whether it was the fault of the plaintiff or defendant. On motion, it doubtless would have been required that the plaintiff should make it certain. No motion was made. The defendant cannot now complain if the plaintiff made it certain by proof. It cannot be said to be a variance, such as could have misled the defendant. It is only where the evidence shows a state of facts different from that averred in the complaint that a fatal variance may be claimed. *City of Huntington v. Meudenhall*, 73 Ind. 460.

Evidence was admitted tending to show damage to the plaintiff's derricks, ropes, guys, etc. There was also evidence tending to show that after the plaintiff resumed work he was delayed, to his injury, by the failure of the defendant to furnish cars, as the contract required, in order to transport stone. It appeared that the plaintiff gave notice that his workmen were being delayed on account of the failure to furnish cars, and that he made repeated requests of the defendant for cars. Under such circumstances the damages resulting were a proper subject for the consideration of the jury. As has been suggested by counsel, the evidence in the record is voluminous, and it might be difficult for us to determine, after the most careful study of it, whether it warranted the jury in reaching the amount of damages assessed. Whether the amount of damages assessed, upon the whole case, was correct or not, de-

pend upon the weight of the evidence. As there was evidence properly admitted which, if believed, sustains the assessment returned, we cannot disturb the finding.

Finally, it is claimed that error was committed by the refusal of the court to instruct, upon the defendant's request, that if the railroad company did not have the foundation for the abutments completed by the twentieth day of November, 1881, and the plaintiff did not have the stone at the site of the abutments, then he was under no obligation to hold himself in readiness to do the work; and that unless the jury believe that a new agreement between the parties was afterwards made, the plaintiff was not entitled to recover damages for the delay occasioned by the failure of the defendant to construct the foundations for the abutments. Within the principles already referred to, this instruction was not a correct statement of the law, and it was not error to refuse it.

To what has been said it is only necessary to add that in a case like this, where work has been completed under a special contract which is counted on by the plaintiff, or which the defendant, under any form of action, may show has been recognized as subsisting during the progress of the work, the contract price furnishes the measure of compensation for the work, to which may be added, as damages, any direct loss sustained by the plaintiff which has been occasioned by the defendant's suspending, or unreasonably delaying, the prosecution of the work without the consent or acquiescence of the contractor. *Doolittle v. McCullough*, 12 Ohio St. 360. The *nisi prius* court applied this rule to the extent that it was applicable to the case, so far as we can discover from the questions presented by the record. The judgment is therefore affirmed, with costs.

Railroads—Failure to complete Grading Contract—Ten Per Cent Reservation on Contract Price for Work done held to be Liquidated Damages, and to be conclusive against Claims of Both Parties.—Upon the failure of a contractor to carry out his agreement for the grading of a certain part of a railroad, the question whether a reservation by the company on the amount agreed to be paid for the work already done should be allowed as liquidated damages is not concluded by the terms of the contract to the effect that it shall be so retained, but is to be determined by the court from a consideration of the nature of the agreement and the surrounding circumstances. (3 Pars. Cont. 157; *Fooley v. McKeegan*, 4 Iowa, 1.)

“But when, from the nature of the contract, the extent of the damages which would result from a breach thereof is difficult or impossible of ascertainment, the fact that the parties have deliberately named a sum which should be treated as liquidated damages on the happening of a breach is of the highest importance in determining the question. The nature of the contract in this case was such that it was entirely proper for the parties to determine in advance what measure of compensation should be allowed in case of a breach. The damages which would result to defendant from a failure by plaintiffs to perform any of their undertakings would necessarily be uncertain and incapable of ascertainment. A failure either as to the time or

manner of performing the work would necessarily delay the final completion of the road, and derange all plans for its equipment and operation, and the damage and injury which would result from such failure would be matters of mere conjecture. It was, therefore, competent for the parties to agree in advance upon a certain measure of damages in case of a failure. And we think this view is abundantly sustained by the authorities." *Wolf v. Des Moines & H. S. R. Co.*, 19 N. W. R. (Ia.) 486, citing *Easton v. P. & O. Canal Co.*, 18 Ohio, 79; *Pierce v. Jung*, 10 Wis. 30; *Faunce v. Burke*, 16 Pa. St. 469; *Geiger v. Railroad Co.*, 41 Md. 4; *Dwinel v. Brown*, 54 Me. 468; *Hennessey v. Farrell*, 4 Cush. 268.

Railroads—Contract to make Donation upon Completion of Road—Condition Precedent.—The right to recover upon a promise to pay a certain sum to aid in the construction of a railroad depends upon a substantial compliance with the conditions precedent. The defendant agreed in writing to pay the Indianapolis, Delphi & Chicago R. Co. \$200 upon the arrival at Delphi from Indianapolis of the first train over the track of the road proposed to be built. The road was built from Delphi to within one and a half miles of Indianapolis, but by a different route, and thence to the union depot in Indianapolis, a distance of four and a half miles, another road was used. *Held*, that the conditions precedent were not performed, and that there could be no recovery. The court said: "To entitle the plaintiff to recover, it must appear that the conditions upon which the money, under the contract, became payable have been performed; that is, that a railroad has been built, or caused to be built, by the plaintiff substantially on the projected route, and that a train has arrived at Delphi over it from Indianapolis.

"It may well be supposed that it was an inducement in the defendant's mind to extend aid to the plaintiff company, in order to secure an independent competitor of the very company to which it, or its successor, became in a measure subservient. To build the road to a point within a mile and a half of the city limits, and without any terminal facilities of its own, to proceed thence, under some arrangement, temporary so far as appears, over the track of another company to the depot, is not a substantial compliance with the contract, even if the road had been built in other respects as proposed. This was ruled in *People, ex rel., v. Town of Clayton*, 88 Ill. 45. See also *Freeman v. Matlock*, 67 Ind. 99.

"It was held in *Stockton, etc., R. Co. v. City of Stockton*, 51 Cal. 338, that where a railroad company would become entitled to a subsidy on condition that it should construct a railroad on a certain proposed route, the purchase and adoption of another piece of road which was already built on part of the proposed route did not forfeit its right to the subsidy. But that is widely different from merely making a temporary arrangement under which the track of another company is used in conjunction with it.

"Whatever else may have been uncertain as to the projected route, two points were definitely fixed, and the money was only to be paid when the first train of cars arrived at Delphi from Indianapolis over the track proposed. As it is not found that these conditions have been complied with, no recovery can be had. *Indianapolis, Delphi & Chicago R. Co. v. Holmes*, 101 Ind. 348, citing *Shearer v. Evansville, etc., R. Co.*, 12 Ind. 452; *Parker v. Thomas*, 19 Ind. 213; *Taylor v. Fletcher*, 15 Ind. 80.

Ultra Vires Construction Contract—Compensation for Work done by Contractor.—Where a contract is set aside as *ultra vires*, the contractor is entitled to fair rates for the work done, with interest from the time the work was stopped. It is the established rule in equity that a corporation is accountable for benefits which it has received under an *ultra vires* transaction. *Green's Brice's Ultra Vires*, 717.

Where a court of equity has set aside a construction contract as *ultra vires*, at the instance of a railroad company, the company must account for

benefits received from partial performance, and although the contractor is not under any guise to receive damages for the loss of his bargain, he is not to be put off with a bare reimbursement of his actual outlay, but is entitled to be paid at fair rates for what he has done, such as any other railroad contractor might have recovered in the absence of an express agreement as to compensation, with interest from the time when the work was stopped. *Green's Brice's Ultra Vires*, 728; *New Castle Northern R. Co. v. Simpson*, 28 Fed. Rep. 214.

Railroads—Receiver—Priority of Claims for Betterments and Repairs.—Claims for supplies furnished for betterments and repairs under a continuous verbal contract made after default and before the appointment of a receiver more than two years subsequently are entitled to priority over the mortgage.

It is an established rule in equity that where receivers are appointed the court may determine, under all of the facts and circumstances, what demands prior to such appointment may be allowed as prior in right to the mortgage. This rule is based upon two propositions: First. When, under the conditions of a mortgage, the mortgagee, after default, permits the corporation to still operate the road, the operations thereafter must be considered for the benefit of the mortgagee, and all others in interest, especially if betterments accrue therefrom. Second. To prevent the indefinite extension of such claims, the courts limit the time within which such demands may be pursued. The court said:

"The case before the court presents this condition of affairs, viz., that under an indefinite contract the intervenors, subsequent to default in the mortgage, continued to furnish materials for the equipment of the road; the account, debit and credit, continuing to the appointment of a receiver. The question is not within the narrow rules governing statutes of frauds, but as to the rights of the parties under the equitable principles stated. The mortgagee could have taken possession of the road under default, had he so elected. He preferred that the corporation should still continue to operate the road, certainly as much for his benefit as that of other parties. Why, then, as after-acquired property is to be included within his mortgage, should he not deal with said betterments according to equitable rules? True, there should be some limit to the enforcement of such alleged obligations,—fixed in this case at six months. But if the contract was a continuous one, to the benefit of all concerned, mortgagee included, and final settlement not made until the appointment of a receiver, should this case fall within the six-months rule? If the mortgagee, instead of enforcing his rights, elects to have the corporation operate the concern, he must be considered in equity as estopped from disputing that such operations were for his benefit, and to be accounted for in the final adjustment of the rights of all concerned. Hence, in this case, it appears that long subsequent to the default, and continuously thereafter down to the intervention of the mortgagee for the appointment of receiver, the demand in question was progressing for the betterments of the road, without objection from any one. Ordinarily, demands as to items accruing prior to the time limited (as, in this case, for six months) would be excluded. But here the contract was incomplete until the appointment of a receiver, and consequently must be treated as falling within the equitable rule." *Blair v. St. Louis, Hannibal & Keokuk R. Co.*, 22 Fed. Rep. 769.

Construction Contract—Extra Work Done under Supervision of Engineer—Presumption as to Specifications.—When a contract for the performance of work refers to specifications made a part of the contract, and requires the work to be done under the supervision of an engineer, and the record, while containing the contract, is silent as to the specifications, it will be presumed that the specifications were furnished by the engineer when the work began, or at least after the contract was made, and this would involve his right to change them from time to time, when the contract re-

quired the work to be done in accordance with any changes that might be made.

One for whom extra work is done not contemplated by the contract, but which is done under the supervision of an engineer placed there by the employer to direct and supervise the work to be performed under the contract, must, when the work is received by the employer, pay for it according to its value, the engineer having made the original contract, and no limitation on his power to contract being shown. *Houston, East & West Texas R. Co. v. Trentem*, 63 Tex. 442.

Construction Contract—Guaranty.—Where a railroad was in process of construction, and the railroad company, by resolution of its directors, duly recorded and signed by the company's secretary, granted to the contractors, upon certain conditions, an extension of the time for completing the road; and the contractors accepted, in writing, the terms of the extension, with the proviso that the guarantors for the payment of monthly estimates of the cost of the road would consent to the extension, in a proposed written form of assent; the contractors might waive the proviso, without thereby invalidating the extension.

Where such guarantors, with full knowledge of the facts, have assented to or ratified such extension of time, by parol, or by their conduct, they will not be discharged from liability as guarantors for the payment of such monthly estimates.

Where the testimony established *prima facie* that a written assent to such extension of time was signed by all the guarantors, except one, who was willing to sign the same, but had omitted so to do through inadvertence, such written assent is admissible in evidence to the jury, as a fact or circumstance tending to show the actual assent of the guarantors to the extension.

Where the contract for building the road provided that the engineers of the company, on or about the first day of each month during the progress of the work, should make an estimate of all work done during the preceding month; and that on or before the fifteenth day of each month eighty-five per cent of the value of such estimate should be paid by the company to the contractors; and that, at the completion of the work, a final estimate should be made, and the balance appearing due the contractors should then be paid to them; the work done during the last month of the life of the contract became the proper subject of a monthly estimate, and in an action against the guarantors to recover the amount thereof, it was error in the court to withdraw from the consideration of the jury a final estimate made by the engineer, from which, by computation, might be determined the amount of such monthly estimate. *Rutherford v. Brachman*, 40 Ohio St. 604.

Contract for Construction—Estimate of Engineer.—A contract for the construction of a railroad provided that the company's engineer should, in all cases, determine questions relating to its execution, including the quantity of the several kinds of work to be done, and the compensation earned by the contractor at the rates specified; that his estimate should be final and conclusive; and that "whenever the contract shall be completely performed on the part of the contractor, and the said engineer shall certify the same in writing under his hand, together with his estimate aforesaid, the said company shall, within thirty days after the receipt of said certificate, pay to the said contractor, in current notes, the sum which according to this contract shall be due." *Held*, that in the absence of fraud, or such gross mistake as would necessarily imply bad faith, or a failure to exercise an honest judgment, the action of the engineer in the premises was conclusive upon the parties. *Martinsburg, etc., R. Co. v. March*, 114 U. S. 549.

Railroads—Estimate of Engineer—Stipulation for, Valid.—When Cause of Action accrues.—In an action to recover a balance alleged to be due on a contract to furnish cross-ties for the construction of the defendant's road,

it is *held* that where, under the terms of the contract, payments are to become due upon the inspection and estimates of the engineer of the defendant company, no right of action accrues until such estimates are procured, unless the engineer refuses to act, or some other matter in avoidance appears.

Where an inspection and an estimate by the engineer in charge of the work are required by the terms of the agreement before either a monthly or a final payment may be demanded, such stipulation forms a condition precedent, and no right of action exists until such inspection and estimate are made. Or if a dispute arises between the contracting parties as to the quality and sufficiency of any work performed under the contract, the dispute must be settled in the manner and by the person provided by the contract, before resort may be had to another forum. (*Delaware & H. Canal Co. v. Pennsylvania Coal Co.*, 50 N. Y. 258; *Jackson v. Cleveland*, 19 Wis. 400; *Hudson v. McCartney*, 38 Wis. 841; *U. S. v. Robeson*, 9 Pet. 827; *Reynolds v. Caldwell*, 51 Pa. St. 805; *Snell v. Brown*, 71 Ill. 142; *Humaston v. Telegraph Co.*, 20 Wall. 27; *Fox v. Railroad Co.*, 8 Wall. Jr. 248.)

Such a stipulation is founded upon a consideration which enters into the contract, and, in the absence of fraud in procuring the contract to be signed, or otherwise, is irrevocable. It is unlike a submission to arbitration, which may usually be revoked at any time before award is made. *Denver & N. O. Construction Co. v. Stout*, 8 Colo. 61.

A Clause in a Contract providing for the Submission to the Chief Engineer of One of the Parties, for Final Decision, of Disputes upon Matters Involved in its Execution is valid.—In an action to recover a balance claimed to be due for grading certain parts of a railroad, after stating the case, and quoting from the contract a provision to the effect that any disputes or differences "as to the construction or meaning of the agreement and specifications, or sufficiency of the performance of any work to be done under it, or price to be paid," should be referred to the engineer of the railway company for final decision, the court proceeded substantially as follows:

"This specification is perfectly valid and binding. It is simply the declaration which contracting parties have a right to make as to what shall be the mode of proof, or what shall constitute sufficient or conclusive evidence, in case disputes arise upon certain matters contained in the contract, provided the evidence so stipulated for be not illegal. (*McMahon v. N. Y. & E. R.*, 20 N. Y. 463; *Smith v. Briggs*, 8 Denio, 78; *United States v. Robeson*, 9 Peters, 371; *Wilson v. York & M. L. R. Co.*, 11 Gill & Johnson, 78.)

"Appellee claims that the total amount of work done by him was underestimated by the engineer, and that consequently his compensation was less by several thousand dollars than it should have been.

"His position is, and must be, that the aggregate amount of grading done under the contract is not one of the matters as to which the engineer's decision was to be final and conclusive. Upon this view of the contract adopted by the court below he obtained his verdict. Upon this view alone could he have maintained his action; for the engineer had passed upon the measurements and fixed the amount of work performed. Appellee charges no fraud against the officer, nor does he aver or attempt to prove any such mistake on the latter's part as will vitiate his determination of the question; these things being true, the engineer's decision would be final if the matter is covered by the words above quoted. *Denver, South Park & Pacific R. Co. v. Riley*, 4 W. C. Rept. 238 (Colo. 1884), citing *Howard v. Alleghany Valley R. Co.*, 69 Pa. St. 489; *Reynolds v. Caldwell*, 51 Id. 298; *O'Reilly v. Keons*, 52 Id. 214; *Condon v. South Side R. Co.*, 14 Grattan, 802; *Vanderwerker v. Vermont Cent. R. Co.*, 27 Vt. 180.

BLATZER *et al.*

v.

RALEIGH AND AUGUSTA AIR-LINE R. Co.

(*Advance Case, U. S. Supreme Court. Dec. 7, 1885.*)

Equity will not reform a contract by inserting the name of a third person as a party on the ground of its omission by mistake or fraud, unless such mistake or fraud is clearly shown.

A, having contracted with the defendant company to construct its road and furnish the iron therefor and to receive North Carolina State bonds in payment, made a contract with the plaintiffs for the iron required, payment to be made in bonds of the same class. A contract was then made by A, the plaintiffs and the President of the defendant company, providing for the deposit of bonds in a bank and their withdrawal on the joint order of the parties to pay the plaintiffs for said iron. *Held*, that said last-named contract did not operate to make the defendant company a party to the contract between A and the plaintiffs.

APPEAL from the Circuit Court of the United States for the Western District of North Carolina.

Mort. Staples and *A. H. Garland* for appellants.

E. R. Robinson and *T. C. Fuller* for appellees.

WOODS, J.—The bill was filed October 18, 1878, by Herman R. Baltzer and William G. Taaks, the appellants, against the Raleigh & Augusta Air-Line R. Co., a corporation of the State of North Carolina, and others, for a decree against the railroad company for \$93,615.62, with interest thereon, from November 2, 1868, that sum being the balance due them, as the plaintiffs alleged, for iron furnished the Chatham R. Co., whose name, on December 1, 1871, was changed by an act of the legislature of North Carolina to the name under which the company is sued in this case. The Chatham R. Co. was authorized to build a railroad from Raleigh to the South Carolina State line. To help the company to construct its road, the State of North Carolina, by an ordinance of its convention passed on March 11, 1868, authorized its public treasurer to issue to the company bonds of the State for \$1,200,000, and, by an act of its general assembly passed August 15 of the same year, authorized the same officer to issue to the company other bonds of the State for the additional sum of \$2,000,000. The bonds of both issues were for \$1000 each, were payable in 20 years, and were secured by a like amount of bonds of the company.

deposited with the public treasurer, and were also secured by statutory liens and by mortgages on the franchises and property of the company. On September 1, 1868, the company had received the \$1,200,000 authorized by the convention, and on October 19, 1868, the company having complied with the conditions prescribed by the act of the general assembly, the \$2,000,000 in bonds of the State authorized by the general assembly were delivered to it. On September 1, 1868, the defendant John F. Pickrell, who was a resident of the city of New York, doing business in Wall Street as a banker and broker, and being in good credit, made an offer in writing, in which he represented himself and John D. Whitford, of North Carolina, to W. J. Hawkins, the president of the Chatham R. Co., to do the entire work on the Chatham R., such as grading, superstructure, and masonry, and furnish all material for the same, including the iron rails, and to take the State bonds in payment. This proposition was accepted by resolution adopted by the board of directors of the railroad company on September 4, 1868. The firm of Greenleaf, Norris & Co. and Charles Gould, of New York, were interested with Pickrell and Whitford in the performance and profits of the contract.

Having thus bound themselves to build the railroad and furnish the iron, Pickrell and Whitford began negotiations for the purchase of the iron with Schepeler & Co., a firm engaged in the iron trade in New York. This latter firm asked Baltzer & Taaks, the plaintiffs, to join them in a contract to sell the iron, which they agreed to do. The parties, Pickrell and Whitford on one side, and Schepeler & Co. and Baltzer & Taaks on the other, met at the office of the counsel of Baltzer & Taaks, in New York, and, in the presence of and with the concurrence of the counsel, a draft of the intended contract for the purchase and sale of the iron was made. In the draught the names of Pickrell and Whitford both appeared as parties of the second part. This paper was taken by Pickrell and Whitford, who said, so the plaintiffs alleged, that they must send it to W. J. Hawkins, president of the Chatham R. Co. Afterwards the paper was returned to Baltzer & Taaks, with various changes, among which was the dropping of the name of Whitford, because he declined to sign the contract as a party. From this paper the final agreement between the parties, dated September 11, 1868, was drawn up by the counsel of CONTRACT FOR IRON. Baltzer & Taaks, and was dated and executed September 11, 1868.

The introduction to this contract was as follows: "This agreement, made this eleventh day of September, one thousand eight hundred and sixty-eight, by and between Messieurs Schepeler & Co. and Messieurs Baltzer & Taaks, of the city of New York, parties of the first part, and John F. Pickrell, also of the city of New York, party of the second part, witnesseth."

By it the parties of the first part agreed to sell and deliver to the party of the second part, and the party of the second part agreed to purchase and receive of the parties of the first part, 10,000 tons of English or Welsh iron rails, at the price of \$79.36 per ton. The contract then proceeded thus: "The iron is to be paid for as follows: "The party of the second part is to deposit with the Continental National Bank, on or before the execution of this agreement, such an amount of the bonds of the State of North Carolina as will, at the market price on the day of deposit, be equal to the whole purchase money for the said ten thousand tons of iron, and fifteen per cent in addition thereto, which margin of fifteen per cent is to be kept good until the full performance of this contract. The said bonds are to be held by said bank, subject to the joint order of the parties of the first and second parts and William J. Hawkins, or his attorney, or the survivors of said parties respectively. On the presentation of a warehouse receipt or ship's delivery order for any lot of said iron, the party of the second part and said William J. Hawkins, or the survivor of them, are to join with the parties of the first part in drawing an order on said bank, in favor of the parties of the first part, for so many of the said bonds as will, at the market price thereof on the day of drawing, equal the sum payable for such lot of iron at the price of seventy-nine dollars and thirty-six cents per ton as aforesaid, or pay that amount in money. Upon presentation of a bill of lading for any lot of such iron placed on shipboard for transportation to the port of New York or Norfolk, Virginia, the party of the second part and the said Hawkins, or the survivor of them, shall join with the parties of the first part in drawing an order on the said bank, in favor of the said parties of the first part, for so many of said bonds as will, at the market price thereof on the day of drawing, equal the sum due for the iron mentioned in the bill of lading at forty-nine dollars and forty-six cents per ton. The balance payable for such iron, namely, twenty-nine dollars and ninety cents per ton, shall be paid in like manner on the arrival of the vessel containing the same at the port of New York or the port of Norfolk. Notice shall be given to the party of the second part, or his personal representatives, of the arrival of any ship containing iron, and he or they are to be ready to receive the same whenever ship is ready to discharge."

The contract further provided that "in the event of the death of said party of the second part, and no appointment of a personal representative at the time notice is required to be given," notice might be given to Hawkins; and "if at any time the party of the second part, or his personal representative," or the said Hawkins or his attorney, or the survivor of them, should refuse to join in drawing an order for the amount due for iron, the parties of the

first part might retain the warehouse receipt and sell the iron for which payment had been refused "for and on account of the party of the second part, or his personal representatives," who should be liable to reimburse the parties of the first part any loss from such resale, and notice of intention to sell should be given "by depositing the same in the general post-office, in the city of New York, addressed to the party of the second part, or his personal representatives, or the said William J. Hawkins, in the event of the death of the said party of the second part, and the non-appointment of any personal representative, in the city of New York."

The contract also contained the following stipulation: "It is understood that the said bonds are deposited as a fund out of which to pay for said iron, and that the parties of the first part are to have a lien on the same, for the faithful performance of this contract on the part of the party of the second part, but it is also understood that the parties of the first part do not look solely to the said bonds for payment; and if for any reason they should at any time fail to constitute a fund for payment, the parties of the first part are nevertheless to be paid for iron at the same rates and times as hereinbefore provided. The party of the second part reserves the right to sell any or all of the bonds deposited with said bank, and in case of sale the money realized for the same, or a sufficient amount to cover the price of all said iron, and fifteen per cent in addition thereto, shall be placed with said bank on the same terms, and represent the said bonds for all the purposes of this contract. The said bank shall deliver the bonds sold on the presentation and delivery of such joint order as aforesaid. The parties of the first part shall have their election to draw, in payment for iron, bonds, or money, the proceeds of bonds, if any shall have been substituted in the place of bonds sold."

The contract concluded, and was signed and witnessed, as follows: "In testimony whereof, the said parties to these presents have hereunto subscribed their names the day and year first hereinbefore written.

"SCHEPELER & Co.,

"By JOHN T. SCHEPELER.

"BALTZER & TAAKS,

"By H. R. BALTZER.

JOHN F. PICKRELL.

"In presence of GEORGE H. STURR."

The contract was, after its execution, acknowledged, in the city of New York, on September 24, 1868, by the parties who signed it, before George H. Sturr, a notary public of New York county. Afterwards, but on the same day, W. J. Hawkins executed a paper

bearing the same date as the contract above mentioned, which opened with the following recital: "Whereas, Messrs. Schepeler & Co. and Baltzer & Taaks and John F. Pickrell have entered into an agreement of even date herewith, by which means the said Schepeler & Co. and Baltzer & Taaks agree to sell and deliver, on certain terms therein mentioned, ten thousand tons of iron rails to the said John F. Pickrell."

By this second contract Hawkins stipulated as follows: "That fourteen hundred bonds of the State of North Carolina, each for \$1000, numbered from 1600 to 3000 inclusive, which are now on deposit in the Continental Bank of the city of New York, subject to my order as president of the Chatham R. Co. of North Carolina, shall remain on deposit in said bank, subject to the joint order of the parties mentioned in the said contract, as therein provided, while said contract is being performed, for the purpose of providing for the payment of said iron, and as security for the performance of said contract as therein provided; and I agree to unite in drawing the orders therein provided for at the times and in the manner therein set forth: provided, however, that it is hereby distinctly understood and agreed that whenever any delivery of said bonds is to be made, and any order for such delivery is required pursuant to said contract, I am to have the option and right to pay in money the sum payable under said contract for the iron, in respect to which such delivery of bonds is required at the contract price; . . . and upon such money payments being made by me, I shall have the right to withdraw from deposit the bonds which otherwise would have been delivered under said contract, and such bonds shall be delivered to me by said Continental National Bank on the presentation of such joint order as aforesaid; such option and right to be exercised by me within five days after being notified in the manner provided in the contract of the right of said parties of the first part therein named to a delivery of bonds pursuant thereto. It is also hereby expressly provided that in case of loss of the iron, or any part thereof, on shipboard between the port of shipment and the port of entry or delivery, all payments made on account thereof are to be refunded by said Schepeler & Co. and Baltzer & Taaks as soon as such loss is ascertained."

This contract was signed "W. J. Hawkins, president Chatham R. Co."

These two contracts were designated in the record, respectively, as "A" and "B."

On October 12, 1868, there were delivered to John F. Pickrell, by Schepeler & Co. and Baltzer & Taaks, under this contract with him, 630 tons of iron rails, and on November 2d following, in three lots, 2104 tons. The 630 tons delivered October 12, 1868,

were paid for, before any North Carolina bonds were issued or received in New York, by the check of Greenleaf, Norris & Co. for \$63,593.46. This more than paid for the iron, and left a balance due Pickrell of \$11,794.27, which was settled with him afterwards. The three deliveries made on November 2d, the price of which was \$167,098.73, were paid for in part by the check of Greenleaf, Norris & Co. for \$75,000, which was cashed, leaving a balance of \$92,098.73. For this balance Baltzer & Taaks received from Pickrell, between November 2d and November 20th, 150 North Carolina State bonds of \$1000 each.

The validity of the bonds of the State of North Carolina issued by authority of the ordinance of the convention of March 11, 1868, and the act of the general assembly of August 15, 1868, having been questioned in the latter part of the year 1868, they became discredited, and both the railroad company and Pickrell were embarrassed thereby. The contract between Pickrell and the railroad company was changed, and the length of the road to be built by Pickrell was, by contract dated March 6, 1869, reduced. Under the contract as amended he built the railroad from Raleigh to Haw River, a distance of 30 miles, furnishing therefor the iron rails. The company paid him in full for the rails and for constructing the road. In consequence of the embarrassment resulting to Pickrell from the discrediting of the North Carolina bonds, no iron was received by him after November 2, 1868, from Baltzer & Taaks on the contract of September 11, 1868; and on August 11, 1869, Baltzer & Taaks, by a letter of that date addressed to Pickrell, released him, as far as they were concerned, "from obligations of receiving any more iron under contract dated eleventh September, 1868, and," they added, "we consider the same as closed." The balance sued for was, therefore, for iron delivered on November 2, 1868.

The bill in this case was based on the assumption and averment that the Chatham R. Co. was a party to the contract of September 11, 1868, designated "A," and that all the stipulations therein made by Pickrell were made by him for the railroad company, acting by its authority and in its behalf, and that the Chatham R. Co. was the party of the second part to the contract, and not Pickrell; that the contract was to be construed together with and as a part of the agreement of the same date signed by W. J. Hawkins, president Chatham R. Co., and designated "B;" and that, under the terms of these contracts, the railroad company had purchased and received from and used 2734 tons of iron rails, on which there remained unpaid and due to the plaintiffs the sum of \$93,615.57, with interest from November 2, 1868. The bill prayed that the contract "A" might be reformed and corrected by the substitution of the name of the

VALIDITY OF
BONDS.

AVERMENTS AND
PRAYERS OF
BILL.

Raleigh & Augusta Air-line R. Co., formerly called the Chatham R. Co., for the name of John F. Pickrell, who, it was alleged, as the agent of said company, nominally signed such agreement as its procurement and request, and for its benefit and advantage, and that said agreement, when so reformed, might be enforced as the agreement and undertaking of the railway company, the same as if its name had been signed thereto and its corporate seal affixed. The bill further prayed for a decree against the Raleigh and Augusta Air-line R. Co. for the said sum of \$93,615.57, and interest thereon from November 2, 1868, with the right to enforce a first lien therefor on all the franchises, estate, and property of the railroad company. The answers of the defendants, under oath, were called for.

The railroad company answered under its corporate seal, and Hawkins and Whitford under oath. Pickrell failed to answer, and

a decree *pro confesso* was taken against him. The
ANSWERS—
HAWKINS
PICKRELL. and railroad company averred in its answer that it was not

a party to the contract of September 11, 1868, designated "A," that Pickrell was not its agent, and had no power or authority to enter into said contract, or any other contract for it; that the contract "B" was signed by the defendant Hawkins to enable Pickrell to carry out the contract "A," which he had previously made with the plaintiffs, by which he expected to procure the iron for the defendant company's road, and with no purpose to become a party to the contract "A," or to bind the railroad company thereby. The answer of the railroad company further averred that Pickrell had paid the plaintiffs for all iron delivered by them under their contract "A," and that the company had paid Pickrell for all work done and materials furnished by him, including iron, under his construction contract with the company, and pleaded the North Carolina statute of limitation of three years in bar of the plaintiffs' suit.

Whitford answered that when the contract "A" was made and
WHITFORD'S ANSWER. executed he was not the agent of the defendant company to make or execute the same, or for any purpose, and did not represent himself to be so to the plaintiff; and that he was not a party to said contract or interested therein.

Hawkins in his answer denied that Pickrell was the agent of the defendant company, or that he had any authority to make any
HAWKINS' ANSWER. contract in behalf of the company for the purchase of iron, and averred that Pickrell made the contract for himself to procure iron to perform his own contract with the railroad company. He denied that the contract "B," signed by himself as president of the Chatham R. Co., was a part of the contract "A," but averred that it was a separate and independent contract, made by him to enable Pickrell to pay for the

iron which he had purchased from Baltzer & Taaks and Schepeler & Co., and that the two contracts were not, at the time of their execution, regarded by any of the parties thereto as forming parts of the same contract, but as distinct, each binding upon the party or parties signing the same, and upon him or them alone, and that he had fully performed every part of the agreement "B" signed by him.

To these answers replications were filed by the plaintiffs. Upon final hearing the circuit court dismissed the bill, and the plaintiffs appealed.

It is plain that the relief prayed for by plaintiffs in their bill of complaint cannot be granted unless they establish the fact that the Chatham R. Co. contracted with them for the purchase of iron rails, and that the rails were delivered by them to the railroad company and have not been paid for.

The agreements set out in the record do not show upon their face any contract by which the railroad company agree to purchase iron rails of the plaintiffs. The plaintiffs, however, insist that, taking contracts "A" and "B" together, and construing them as one contract, an agreement of the railroad company to buy 10,000 tons of iron from the plaintiffs can be made out. We think otherwise. If both contracts had been written on the same sheet of paper and executed at the same time, that fact would not have changed the obligations which the parties assumed. Reading both contracts, it appears that the plaintiffs, the parties of the first part, sold and agreed to deliver to Pickrell 10,000 tons of iron rails. Pickrell agreed to receive the rails, and pay for them at a certain price in bonds of the State of North Carolina, and Hawkins, as agent of the Chatham R. Co., agreed to join with the other parties in an order for the withdrawal of the bonds from their place of deposit, to be handed over to Pickrell, and by him handed over to the plaintiffs. In this manner the debt of the company to Pickrell, and the debt of Pickrell to the plaintiffs, for the iron, would be paid. There is nothing in either of the two contracts, considered separately or as one, which discloses any contract between the plaintiffs and the railroad company for the sale and purchase of iron. On the contrary, contract "A" is a contract for the sale and purchase of iron, to which the plaintiffs and Schepeler & Co., on one part, and Pickrell, on the other, were the only parties, and Exhibit "B" opens with a recital of the fact that, by contract "A," the plaintiffs and Schepeler & Co. had agreed to sell and deliver to Pickrell 10,000 tons of iron rails. The railroad company was not mentioned in contract "A," and all that it agreed to do by contract "B" was to unite in an order for the bonds. But the plaintiffs contend that the two contracts are to be so read that Pickrell, who, according to

NO CONTRACT BY
RAILROAD COM-
PANY TO PUR-
CHASE IRON.

contract "A," agreed to buy and pay for 10,000 tons of iron, is not to buy the iron or pay for it, or do anything which the contract requires him to do, but that the railroad company, which is not named as a party to it at all, is to do everything which the contract requires of Pickrell.

On the theory that the two contracts were one contract, to which the railroad company and not Pickrell was a party, the inquiry is pertinent—what was the necessity of its execution by Pickrell at all, when it was signed by Hawkins, the president of the company, and why should the railroad company, having two agents fully authorized to make the entire contract, execute one part of it by one agent, and the other part by the other? In the light of the surrounding circumstances, the meaning of the two contracts is plain and is not open to construction, especially to a construction which relieves one party of all the obligations assumed by him and puts them upon another, who had not assumed them at all. Pickrell having made a contract with the railroad company to construct its road and furnish the iron therefor, and to take his pay in North Carolina State bonds, makes another with the plaintiffs for the iron, and agrees to pay for it with the same class of bonds which he was to receive from the railroad company. Now, in order to secure to the plaintiffs their pay for the iron sold, and Pickrell pay for his work done and materials furnished, and to protect the railroad company from a misappropriation of its State bonds, the contract "A" provided that, upon presentation of a warehouse receipt or ship's delivery order for any lot of iron, all three parties—the plaintiffs, Pickrell, and Hawkins, the president of the railroad company—should join in an order for the withdrawal from the bank of so many bonds as would pay for such lot of iron. It was because the railroad company was not a party to contract "A" that the contract "B" was executed by Hawkins, its president, whereby he agreed to join in an order for the withdrawal of bonds when the plaintiffs were entitled to them by the terms of their contract "A" with Pickrell. It is plain, therefore, that, as they stand, the contracts mean, what their language imports, that Pickrell contracted with the plaintiffs for the purchase of the iron, and the railroad company did not.

But the plaintiffs contend that contract "A" should be reformed by substituting therein the name of the defendant railroad company, the real party of the second part, for the name of John F. Pickrell, and, being thus reformed, that they are entitled to the further relief prayed in their bill. To entitle the plaintiffs to this relief, they must show that the name of Pickrell, as the party of the second part, was inserted, and the name of the railroad company left out of the contract, by

REFORMATION
OF CONTRACT
"A."

mistake or fraud. In such a case, it is well settled that equity would reform the contract, and enforce it, as reformed, if the mistake or fraud were shown. *Bradford v. Union Bank*, 13 How. 66; *O'Neil v. Teague*, 8 Ala. 345. But the mistake must be clearly shown. If the proofs are doubtful and unsatisfactory, and if the mistake is not made entirely plain, equity will withhold relief. *Shelburne v. Inchiquin*, 1 Brown, Ch. 338; *Henkle v. Royal Assur. Co.*, 1 Ves. Sr. 317; *Gillespie v. Moon*, 2 Johns. Ch. 585; *Lyman v. United Ins. Co.*, Id. 630; *Clopton v. Martin*, 11 Ala. 187; *Stockbridge Iron Co. v. Hudson Iron Co.*, 107 Mass. 290. Even without the application of this strict rule the case of the plaintiffs fails.

In the first place, there is no averment in the bill that the name of Pickrell was inserted in the contract by mistake or fraud for that of the railroad company; and, as far as the record shows, the plaintiffs never asserted in any way that such was the case until after the bringing of this suit, more than 10 years subsequently to the execution of the contract. The facts already stated and not disputed show that there was no fraud or mistake in draughting the contract. Both the original draught and the final contract were drawn under the supervision of counsel for the plaintiffs, and the latter was signed by the parties on September 11, 1868, and nearly two weeks later was acknowledged by them before a notary public. The record shows that the plaintiffs, so far as the contract was carried out, performed it precisely as its terms required. The iron delivered was delivered to Pickrell, the payments made were made by Pickrell and receipted for to him, the accounts in reference to the business were kept in his name on the books of the plaintiffs, and overpayment made on the iron delivered was returned to him, and a final settlement and adjustment of the business, and a statement of the account of the plaintiffs with him arising out of the contract, were made nearly a year after the last delivery of iron.

It is necessary, in order to sustain their contention that the name of Pickrell was inserted in the contract when that of the railroad company should have been, for the plaintiffs to show that Pickrell was the agent of the railroad company, authorized by it to make the contract, and that he used his own name in the contract instead of the name of his principal. There is no proof in the record to show that the defendant company ever authorized Pickrell to act as its agent in any matter whatever; on the contrary, it is established beyond question, that Pickrell was not the agent of the railroad company. The company denies it in its answer; Hawkins, the president of the company, denies it; Whitford, the associate of Pickrell, denies it; and Pickrell himself does not assert the contrary, and he swears he did

INSERTION OF
NAME OF PICK-
RELL IN CON-
TRACT.

PICKRELL AS
AGENT OF RAIL-
ROAD COMPANY.

not, in purchasing the iron of the plaintiffs, represent him Whitford to be the agent of the railroad company. There is no proof in the record which tends to rebut this evidence; on the contrary, all the dealings of the plaintiffs with Pickrell, the ledger accounts, payments, and settlements relating to the contract, show that Pickrell was acting for himself, and the plaintiffs understood it, and that the contract was what it purports to be, and in all its provisions to be, namely, the contract of Pickrell and not of the railroad company.

If John F. Pickrell, party of the second part in contract "B" means the Chatham R. Co., then the execution of "B" was a vain and futile act. It is only a theory that Pickrell, and not the railroad company, is the party of the second part in contract "A," that the name for contract "B" becomes apparent. For the railroad company, having, according to the contention of plaintiffs, consented to a method for the withdrawal of the bonds provided in contract "A," it was bound and protected thereby, and there was no necessity for the preparation and execution of another contract, where the railroad company bound itself to substantially the same thing. It is also apparent upon the most cursory reading of contract "A" that the substitution of the name of the railroad company of Pickrell would render several of its provisions nugatory and impossible of execution, and the paper generally incongruous and absurd. But if anything further were needed to show how wrong is the contention of the plaintiffs that the name of Pickrell was inserted in the contract "A" in place of that of the railroad company by mistake or fraud, it is found in the deposition of one of the plaintiffs, who testifies that contract "A" was prepared by the counsel of the plaintiffs, and that the names "A" and "B" express in exact words the final agreement of the parties with reference to the matter embraced therein. As, therefore, the contract expressed the agreement of the parties, no court has power to change it. No court of equity may compel parties to execute their agreements, but has no power to make agreements for them. *Hunt v. Roush*, 1 Pet. 1.

The evidence which was offered of the understanding between Blatzer and Pickrell that the covenants of Pickrell were not covenants of the railroad company was inadmissible—First, because, as a general rule that when a contract has been reduced to the form of a document or series of documents, no evidence is to be given of the terms of such contract, except the document itself; and, second, the railroad company could not be bound by the understanding of other persons to which it was not a party. The contract of the railroad company appearing upon the face

PICKRELL'S
NAME SUBSTITUTED FOR R. CO.

COURT OF
EQUITY WILL
NOT CHANGE
CONTRACT.

papers was that contained in contract "B," and that covenant Baltzer, one of the plaintiffs, and Hawkins, who signed it as president of the railroad company, both testified had been fully performed. The plaintiffs, therefore, fail in the first step necessary to entitle them to the relief prayed by their bill,—they show no contract between themselves and the railroad company.

But their case must fail for another reason. The evidence in the record shows conclusively that the plaintiffs were paid by Pickrell, in accordance with the terms of their contract with him, for all the iron bought by Pickrell and used by him in the construction of the road of the defendant company.

It is not disputed that for the balance now sued for Baltzer & Taaks received from Pickrell, between November 2 and November 20, 1868, 150 North Carolina bonds of \$1000 each. On November 20th they reported in writing to Pickrell that they had sold 100 of the bonds at 64 cents on the dollar, amounting to \$62,493.40, and on November 21st that they had sold the remaining 50 bonds for 63½ cents on the dollar, amounting to \$30,996.82, "producing to" his "credit" \$93,490.22. The proceeds of the bonds, with the overpayment made by Pickrell on the first lot of iron delivered, more than paid the amount due on the lots delivered November 2, 1868. On November 23, 1868, Baltzer & Taaks stated their account with Pickrell, which showed there was due to him on account of overpayment for the iron delivered \$937.44, and this sum they paid him on December 28, 1868. By a final balance-sheet, made out by themselves in September, 1869, more than 10 months after the bonds were received by them, and 9 months after the North Carolina bonds had, according to the averments of their bill, become discredited and of little value, they credited Pickrell with the amounts for which, on November 20 and 21, 1868, they reported that the bonds had been sold by them, and such balance-sheet showed that they had been paid in full for all the iron furnished by them. There is no averment in the bill that the plaintiffs did not sell the 150 bonds as they reported to Pickrell they had done, or that they still have them in their possession, and there is no offer to return them either to Pickrell or the railroad company. These facts, considered in connection with the further fact that the contract for the sale of the iron provided that payment therefor should be made in North Carolina State bonds, leave no ground for the contention that there is anything due the plaintiffs from any one for the iron furnished under contract "A."

Therefore, without considering the fact that the plaintiffs have never, either in their bill or at any time, tendered back the 150 bonds of the State of North Carolina, which they admit they received, on account of the iron furnished, or the fact that Schepeler

& Co., who were parties to the contract on which the suit is are not made parties plaintiff, and without considering the of limitations of North Carolina, which is pleaded by the company, we are of opinion that the plaintiffs have failed to tain their suit. and their bill was properly dismissed. affirmed.

GLANDON

v.

CHICAGO, MILWAUKEE AND ST. PAUL R. CO.

(*Advance Case, Iowa. April 6, 1886.*)

Where cattle are killed by reason of the failure of a railroad construct erect fences along its tracks, the company will be liable for double d under the statute, although the road has not been completed and op traffic, and the injury complained of is caused by a construction tra ing materials to be used in the construction of the road at a point where the accident occurred.

APPEAL from Keokuk district court.

This is an action for double the value of two colts, one of the plaintiff claims was killed and the other injured so that of no value,—the injury having been caused by a train upon a railroad operated by the defendant. There was a jury, which resulted in a verdict and judgment for plaintiff double the damages sustained by him. Defendant appeals.

Chambers, McElroy & Carver for appellant.
Sampson & Brown for appellee.

ROTHRICK, J.—The petition in the case was in three counts of them claimed the right of recovery under the double statute, and the other claimed a common-law action for negligence in operating the train. No consideration was given to the last-named cause of action, because the jury returned their verdict upon the statute.

The facts are not in dispute. It appears from the evidence that the defendant, in constructing its railroad from Cedar Rapids to Ottumwa, laid its track through a pasture field of the defendant on Monday. The injury occurred on the next Saturday. The defendant laid its track from both ends of the road at the same

The track-laying force from the south laid the track through the pasture, and met the force from the north several miles from plaintiff's farm, and the two working gangs connected the tracks on the evening after the injury, so as to make a through line between the points above named. From the time the track was laid through the pasture up until the injury the defendant used a construction train, which made two round trips a day along the line and through the pasture, and which train carried iron rails, ties, and other track-laying materials. The colts were injured by this train. The right of way was not fenced, and the jury were fully warranted in finding that the animals were injured by reason of the want of a fence.

The court, among other instructions to the jury, gave the following: No. 6. "If at the time of the alleged killing and injury the defendant had completed its railroad through the farm of plaintiff, so that it was running a construction train and engine over the same to aid in the completion of the road beyond plaintiff's farm, and had been so running the same for several days prior to the time of such alleged killing and injury, then it was a corporation operating a railway, within the meaning of the law, notwithstanding it was not, and had not been, open for general traffic, or for carrying freight or passengers for hire." The defendant excepted to this instruction, and requested the court to charge the jury to the effect that there could be no liability for failure to fence until the road was completed for traffic thereon, and that a reasonable time should be allowed after the completion of the road to enable defendant to erect the fences. These instructions were refused, and the defendant excepted, and this question is the only one necessary to be determined.

Section 1289 of the Code provides that "any corporation operating a railway that fails to fence the same against live-stock running at large, at all points where such right to fence exists, shall be liable to the owner of any such stock injured or killed by reason of the want of such fence for the value of the property or damage caused, unless the same was occasioned by the wilful act of the owner or his agent. . . ." The primary object of this statute is to reimburse the owners of live-stock killed or injured by the operation of a railroad. It does not require the railroad company to fence its road, but leaves it optional to do so, or to be absolutely liable, under the conditions named, for all damages for live-stock injured or killed by the operation of the road. The moving of trains over a railroad, for whatever purpose, is operating a railroad within the meaning of the statute. It seems to us that it is wholly immaterial whether the train is used for carrying construction material for the further extension of the road, or in carrying passengers or freight for hire. Live-stock are exposed to the danger contemplated by the statute

IMMATERIAL
WHETHER TRAIN
THAT KILLS
CATTLE IS A
CONSTRUCTION
TRAIN.

just the same in one case as in the other. The argument reasonable time must be given to the company after laying the track to fence the line is based upon the inconvenience of fencing until the whole line of road is completed. We think the question of convenience should be considered. The question for the company to determine whether it will close the fences when it commences to run trains over the road, the risk of liability for killing or injuring stock until such time it shall be convenient to fence; and it may well be said that it is no more inconvenient to transport the fencing material than to ship the iron rails, ties, and other material necessary for the track. We have examined the authorities cited by counsel for the appellant, and we do not think they hold any doctrine not in accord with what we here determine. We do not believe a reversal to be necessary.

Affirmed.

See *Pound v. Port Huron & S. W. R. Co.*, 19 Am. & Eng. R. R. C.

PHILLIPS

v.

MISSOURI PACIFIC R. Co.

(*Advanee Case, Missouri. November 30, 1885.*)

The Double Damage Act, R. S., § 809, requiring railroad corporations to erect and maintain fences and cattle guards, and making them liable for damages so to do, in double the amount of damages arising from injury to cattle, is not repugnant to the constitution of the State or of the United States.

Section 2885 R. S., conferring jurisdiction upon justices of the peace in actions against any railroad company to recover damages for injuring horses, etc., without regard to the value of the animal or the damages claimed, is a general law and does not contravene the constitutional provision against the enactment of any local or special law regulating the jurisdiction of justices of the peace.

APPEAL from the Cooper County Circuit Court. Affirmed.

Action commenced before a justice of the peace to recover damages for stock alleged to have been killed by defendant.

The statute allowing double damages for animals killed on a railroad, being R. S., § 809, is as follows: "Every railroad corporation formed or to be formed in this State, and every corporation

formed under this chapter, or any railroad corporation run-
operating any railroad in this State, shall erect and maintain
fences on the sides of the road where the same passes through,
adjoining inclosed or cultivated fields or uninclosed lands,
openings and gates therein to be hung, and have latches or
locks that they may be easily opened and shut at all necessary
crossings of the road, for the use of the proprietors or owners of
land adjoining such railroad, and also to construct and maintain
guards, where fences are required, sufficient to prevent horses,
mules and all other animals from getting on the railroad;
and fences, openings, gates and farm crossings and cattle
guards aforesaid shall be made and maintained, such corporation
shall be liable in double the amount of all damages which shall be
done by its agents, engines or cars to horses, cattle, mules or other
animals on said road, or by reason of any horses, cattle, mules or
animals escaping from or coming upon said lands, fields or in-
closures, occasioned in either case by the failure to construct or
maintain such fences or cattle guards. After such fences, gates,
openings and cattle guards shall be duly made and maintained,
such corporation shall not be liable for any such damages, unless
the same are wilfully done."

§ 2835 R. S., also discussed in the opinion, is set out

vs. Krauthoff for appellant.

vs. Williams for respondent.

FACTS.
The action was commenced before a justice to re-
cover damages under § 809, R. S., for stock al-
ready killed by defendant. Judgment was obtained
in the justice's court, from which defendant appealed to the circuit
court where a judgment was again rendered for plaintiff, from
which appeal is prosecuted to this court.

Argued by defendant's counsel that § 809, R. S.,
the Double Damage Act, is in contravention
of the federal and State constitution, and there-
fore unconstitutional.

The question was considered in the cases of *Barnett v. Railroad*
Co., 56; *Speelman v. Railroad Co.*, 71 Mo. 434; *Humes v.*
Co., 82 Mo. 221; and in all of them the constitutionality
was affirmed.

In the case last cited the question is exhaustively considered by
Justice Phillips, who wrote the opinion, and we do not feel
compelled to add anything to what is there said.

The above cases were decided the Supreme Court of the
United States in the case of *Terry v. Mo. Pac. R. Co.*, 115 U. S.,

& E. R. Cas.—24

523, has expressly held said § 809 to be not repugnant to the constitution of the United States.

It is also insisted by counsel that § 2835 of the R. S., conferring jurisdiction upon justices of the peace of "All actions against any railroad company in the State to recover damages for injuring or killing horses, etc., in regard to the value of such animal or the amount claimed for killing or injuring the same," is in violation of § 53, subd. 4 of the State constitution, and is therefore void. The ground on which the argument is based is as follows:

"The general assembly shall not pass any local or special law regulating the jurisdiction of justices of the peace."

In the determination of a question involving the constitutionality of a law, it is a settled rule for the guidance of courts that the acts of the legislature are presumed to be constitutional, and it is only where they manifestly infringe on some provision of the constitution that they can be declared void for that reason. In doubt, every possible presumption not directly inconsistent with the language and subject matter is to be made in favor of the constitutionality of the act. *State v. Able*, 65 Mo. 357.

Guided by this rule we can reach no other conclusion than to pronounce the act in question valid.

Section 2835 is a general and not a local or special law. It does not apply alone to a single justice of the peace or to the justices of a single county; nor does it give to justices of the peace of one county a different jurisdiction from that given to all the justices of the other counties in the State, but it applies alike to all the justices of the peace in every county and confers like jurisdiction upon all of them in the cases to which it refers. It cannot, therefore, be properly said that said section of the statute is in violation of the section of the constitution invoked by defendant, which forbids the legislature from passing a local or special law regulating the jurisdiction of justices of the peace. The legislature has the undoubted right by a general law to regulate the jurisdiction of such justices, and it has done nothing more than this in the enactment of said section.

It is also insisted that said act is special because it is directed against railroads alone. If the act had provided that justices of the peace should have jurisdiction of cases against a single railroad only, it might be subject to the objection urged, but it does not provide; it does not apply only to one railroad of a class, but applies to all railroads in the State as a class.

Class legislation is not necessarily obnoxious to the constitutional provision relied on. "It is a settled construction of similar constitutional provisions that a legislative act which applies to a class embraces all of a class of persons 'who are or may come

situations and circumstances, is not partial." *Humes v. Railroad Co.*, 82 Mo. 221, and cases cited.

Judgment affirmed, in which all concur.

Recovery of Double Damages for Killing Stock.—See *Spealman v. Mo. Pac. R. Co.*, 2 Am. & Eng. R. R. Cas. 686; *Scott v. St. Louis, etc., R. Co.*, 18 Ib. 651; *Memphis, etc., R. Co. v. Cooley*, 20 Ib. 558; *Henderson v. Wabash, etc., R. Co.*, 22 Ib. 595.

Railroads—Double Damage Act—Merely abutting upon Town Plat, no Excuse for Failure to Fence.—A railroad company is not excused from fencing under the double damage act, where its right of way merely abuts upon a town plat and none of the streets or alleys of the town abut upon or cross such right of way. *Wymore v. R. Co.* 79 Mo., 247; s. c., 18 Am. & Eng. R. R. Cas., 524; *Kirkland v. Mo. P. R. Co.*, 82 Mo. 466.

Double Damage Act of Missouri—Pleading under—What must appear.—Under the "Double Damage Act" of Missouri the statement filed with the justice of the peace, in an action for killing stock, must show by direct averment or necessary implication that the killing did not occur within the limits of some incorporated town. *Rowland v. St. L., I. M. & S. R. Co.*, 78 Mo. 619; *Schulte v. St. L., I. M. & S. R., Co.*, 76 Mo. 324.

The statute in question is a penal one, and it requires greater strictness of construction, both as to *allegata* and *probata*, than is requisite in ordinary cases. *Fusz v. Squaunhorst*, 67 Mo. 256; *Sedg. Stat. Const. and L.* 281; *Manz v. St. L., I. M. & S. R. Co.*, 2 West. Rep. 472.

But in another case, in which the petition avers that the point of entry and that where the injury occurred are where the road "passes through, along or adjoining inclosed or cultivated fields or uninclosed lands," and that the action is brought under the act in question, it is held to be sufficient. *Farrell v. Union Trust Co.*, 77 Mo. 475; *Jackson v. St. L., I. M. & S. R. Co.*, 80 Mo. 147. See also *Williams v. Hannibal & St. J. R. Co.*, 80 Mo. 597.

Killing Stock—Double Damages.—In an action for double damages for the killing of a cow through the negligence of a railroad company, where the evidence shows that the animal was killed at a point where the road was fenced on one side only, and at a point even beyond the switch limits, and a quarter of a mile from the depot, the case is properly submitted to the jury on the question of negligence. *Lepp v. St. Louis, etc., R. Co.*, 2 Western Rep. 109.

WELTY

v.

INDIANAPOLIS AND VINCENNES R. Co.

(*Advance Case, Indiana. January 21, 1886.*)

It is the duty of railroad companies to place cattle-guards at highway crossings wherever practicable, and they are liable for animals killed because of a failure to discharge this duty, although they may have been free from negligence in killing the animals, and although the owner may have been guilty of contributory negligence.

An owner who knowingly abandons his animals to destruction by trains, or wilfully exposes them upon the track of a railroad company not recover, although the company may not have performed the duty of fencing its track.

An owner lent his horse to another person to ride to a neighboring and the borrower, on his return, while riding the horse, suffered it to the highway, and travel upon the railroad track a distance of 800 feet, becoming frightened at an approaching train, it ran into a trestle-work was killed by the train. *Held*, that the owner cannot recover; for the borrower, as against the railroad company, is to be regarded as the agent.

The fact that the borrower of the horse in the case above stated voluntarily made himself drunk does not change the legal aspect of the case for voluntary drunkenness is not available to avert the natural and consequences flowing from a wrongful act.

APPEAL from Morgan Circuit Court.

Harrison & McCord for appellant.

S. O. Pickens for appellee.

ELLIOTT, J.—The appellant was the owner of a mare, value of \$150, on the thirtieth day of September, 1882, and that day lent her to Thomas King to ride to Martinsville.

FACTS. became intoxicated while at that place, and was condition upon his way from that town to the appellant's. The mare, with King as her rider, travelled along the public way leading to the house of the appellant, but, when she came to the place where the highway crossed the track of the appellant's railroad, left the highway, and travelled along the railroad track about 800 feet. An approaching train frightened her, caused her to run into a trestle-work, where the train ran upon her and killed her. There were no fences or cattle-guards at the highway crossing, and nothing to prevent the mare from entering upon the railroad track. Upon a special verdict, setting forth these facts, the trial court gave judgment in favor of the appellee.

The appellant founds his cause of action entirely upon the requirement that the railroad companies should securely fence their tracks, and the facts stated in the special verdict make a case within the statute which he cannot recover; for a plaintiff must recover upon the facts which his complaint is framed, or not at all. *Leeds v. City of Richmond*, 102 Ind. 372; s. c., 1 N. E. Rep. 711; *City of Indianapolis v. Reed*, 99 Ind. 531; *Sims v. Smith*, Id. 469, see page 477; *W. & A. Co. v. Reed*, 96 Ind. 195; *Same v. Young*, 93 Ind. 118; *Leeds v. Tully*, 91 Ind. 96, and cases cited.

Contributory negligence is not a defence to an action based upon the statute imposing on railroad companies the duty of securely fencing their tracks. The disregard of this duty is not simply negligence on the part of a railroad company, but it is a tort, for it involves the direct violation of a positive and

CONTRIBUTORY
NEGLIGENCE NO
DEFENCE.

law. So the statute treats the disregard of duty, and so our decisions have uniformly declared. *Jeffersonville, etc., Co. v. Ross*, 37 Ind. 545, see page 549; *Louisville, etc., Co. v. Cahill*, 63 Ind. 340; *Louisville, etc., Co. v. Whitesell*, 68 Ind. 297. A very forcible assertion of this doctrine is contained in the opinion of Judge Cooley, in *Flint, etc., R. Co. v. Lull*, 28 Mich. 510. This rule, of course, only applies to cases where the railroad company is bound to fence; for, if the animals killed entered upon the track at a place where the railroad company was not bound to fence, then the contributory negligence of the owner will prevent a recovery. *Cincinnati, etc., Co. v. Hiltzhauer*, 99 Ind. 486. The rule declared in the case last cited, that if stock are killed at a point where the railroad company was not bound to fence, a recovery will be defeated by contributory negligence, does not apply here; for the place where the mare entered upon the track was one which the appellee was bound to protect by cattle-guards, and the failure to construct suitable guards, where it is the duty of the railroad company to construct them, is regarded as a failure to fence. *Fort Wayne, etc., Co. v. Herbold*, 99 Ind. 91. What we have said shows that the element of contributory negligence exerts no influence upon the decision of this case, and that our judgment must be given irrespective of that element.

An owner who abandons his animal cannot recover, although it entered upon the track of a railroad, and was killed at a place where the company failed to perform its statu-
ABANDONMENT
OF ANIMAL BY
OWNER.
 tory duty by fencing its track. *Knight v. Toledo, etc., R. Co.*, 24 Ind. 402; *Jeffersonville, etc., Co. v. Dunlap*, 29 Ind. 426; *Corwin v. New York, etc., R. Co.*, 13 N. Y. 42, see opinion, Denio, J., page 54. Sound principle supports this rule. If an owner were permitted to voluntarily put his domestic animals in a situation where it was almost certain that they would be killed by passing trains, and yet, in the event that they were killed, recover from the railroad company, it would open the way to great frauds, since it would enable the owner to recover for property voluntarily exposed to destruction; but this would not be the only evil result, for a further evil consequence would be that the temptation to get rid of animals not needed or not useful, at the expense of the railroad company, would endanger the safety of those who travel upon our railroads. Public policy requires that a man who voluntarily puts his property in a place where it is certain that it will be destroyed, shall not receive assistance from the courts. A man who willingly abandons his property to destruction, or purposely exposes it to a known danger, has no right, either in law or morals, to invoke the assistance of the courts of justice to secure pay for it. But, in order to deprive the owner of his rights under the statute, there must be something more than mere contributory

negligence, there must be a voluntary abandonment of his property, or an intentional exposure of it to danger. This intent to be sure, need not be expressed in direct words or acts.

It may be inferred from circumstances, but it must nevertheless be shown. When it does appear that it exists, then, under the maxim *non fit injuria*, there can be no recovery. If a man consents to the destruction of his property, he cannot recover its value. If the owner rides his horse upon a railroad track, he must, under the reasoning of the cases to which we have referred, be deemed to have voluntarily exposed it to destruction. Such an act is an assent to its destruction, and indicates an abandonment of it. The omission of the railroad company to do what the law requires it to do does not authorize an owner of property to place it on the track for the legislature cannot be presumed to have intended that one who abandons his property shall nevertheless recover its value.

To us it seems clear that, if the appellant had ridden his horse upon the defendant's track, he would not have the slightest ground

RIDING UPON THE TRACK. upon which to base his claim for the value of his horse. Such an act is something more than mere negligence; it is a wilful trespass upon the property of another, exposing the trespasser to imminent danger. If the owner voluntarily puts his property in such a dangerous position as to its destruction, for the maxim is that a man is presumed to intend the natural consequences of his act. The act of riding a horse upon a railroad track is not defensible upon any ground save that of necessity, and he who does such a wrongful act without the necessity must abide the consequences. The case we have cited furnishes far stronger evidence of an abandonment of property than that of *Knight v. Toledo, etc., Co., supra*, and yet it was said:

"Under such circumstances, we do not think the party can be heard to complain in a court of justice. It would be a violation of one of the maxims of the law."

In *Jeffersonville, etc., Co. v. Dunlap, supra*, it was said:

"So, very clearly, if the owner drives his animal upon the track so that it may be killed, or allows it to wander under such circumstances as justify the conclusion that he desires that result, he cannot suppose that the legislature intended that the railroad company should be liable on account of its failure to fence the track."

We assume, on the strength of these authorities and the principles which we have stated, that, if the appellant had himself ridden the mare upon the track, he could not recover.

The borrower of the mare stood to the railroad company as the owner, for the latter had placed it in the borrower's possession and control. We suppose it to be true for debate that if the borrower had, while sober, purposely

deliberately ridden the mare upon the track, in front of an approaching train, that the company would not be liable. It would shock every just mind to affirm that a railroad company must pay for property placed in certain danger of destruction by the man to whom the owner had intrusted it. If the act of the person placed in possession of the property would, in the case supposed, relieve the company from liability, it must have that effect in all cases where the injury to the property is due to the wrongful act of the person in possession in voluntarily exposing it to danger. Whether the person in possession of a horse rides in front of an approaching train, or rides upon the track where there is no means of escaping from trains, he must, in either case, be deemed to have voluntarily exposed the property to danger, and, in contemplation of law, to have consented to its destruction; for he is presumed to intend the natural consequences of his acts. We assume, then, that the appellant has no cause of action if the act of King can be regarded as such a reckless and intentional exposure of the mare to danger as constituted an abandonment of the property, or implies consent to its destruction. King's act in riding upon the track must be deemed to imply consent to the destruction of the mare, unless the fact that he was intoxicated is a sufficient cause for holding that the presumption that he did not intend the natural consequences of his act cannot prevail against him. It is clear, upon principle and authority, that it cannot have that effect.

Drunkenness is no excuse for crime; and, if it cannot be used as an excuse by one accused of crime, it is not conceivable that it can be used, where only property rights are involved, to avert consequences which usually result from a ^{DRUNKENNESS} ~~NO EXCUSE~~ wrongful or negligent act. *Goodwin v. State*, 96 Ind. 550, and cases cited. In *Broome v. Franklin Life Ins. Co.*, 97 Ind. 478, it was held that the representative of a man who met his death while committing an assault and battery could not urge, as a cause for averting a forfeiture of a policy of life insurance, that the insured was drunk at the time he committed the unlawful act. Judge Cooley says: "The fact that a tort was committed while a defendant was intoxicated is no excuse whatever." Cooley, *Torts*, 114. Another author says: "Intoxication should not benefit any man." *Shear. & R. Neg.* § 29, note. The adjudged cases agree that intoxication will not excuse a man from the exercise of the care and diligence required of all citizens. *Yarnall v. St. Louis, etc., R. Co.*, 75 Mo. 575; *Fitzgerald v. Weston*, 52 Wis. 354; *Denman v. St. Paul, etc., R. Co.*, 26 Minn. 357; *Beach, Neg.* 204; 1 *Thomp. Neg.* 430. The principle deducible from these authorities is that voluntary drunkenness is not available to avert the usual and natural consequence flowing from a man's act, and from this deduction flows the ultimate conclusion that a drunken man

will be held to the same measure of responsibility as a sober one, and his actions judged by the same standard, except in cases of contract.

As this is the rule, the act of King in riding the appellant's mare upon the railroad track must be treated as if it had been done by a sober man, and, thus treated, it is evident that there can be no recovery by the appellant. This result is just in itself, and required by the highest consideration of public policy. If it were otherwise, then a drunken man might purposely ride his horse upon a railroad track, in front of a locomotive, and secure a recovery by pleading his own wrong in voluntarily making himself drunk. Such a result no principle of right or justice would tolerate. If King had been sober, there could be no doubt that the appellant could not recover; and, as King's drunkenness cannot be permitted to change the nature of his act, it conclusively follows that his drunkenness will not avail to change the results that flow from that act. The same rule applies to him drunk, as to him sober. If it was otherwise, a premium would be put on drunkenness, and that the law has never yet done, and it is not hazardous to affirm, never will do.

Judgment affirmed.

Liability for Killing Stock owing to Failure to Fence, although Plaintiff was Guilty of Contributory Negligence.—See *Burlington, etc., R. Co., v. Brinckman*, 11 Am. & Eng. R. R. Cas. 488; *Atchison, etc., R. Co. v. Riggs*, 15 Ib. 581; *Cressly v. Northern R. Co.*, 15 Ib. 540; *Burlington, etc., R. Co. v. Webb*, 22 Ib. 617, and note; *Chicago, etc., R. Co. v. Sims*, 22 Ib. 618.

INDIANAPOLIS, BLOOMINGTON AND WESTERN R. CO.

v.

KOONS.

(*Advance Case, Indiana. March 4, 1886.*)

Where a railroad company, in consideration of a grant of a right of way, contracted to maintain fences, and to construct and maintain a crossing with cattle-guards, it became its duty to comply with its contract within a reasonable time, and, upon its failure so to do, a cause of action arose in favor of the plaintiff, for the reasonable cost of carrying out the provisions of said contract.

Where a contract upon an entire consideration stipulates for the performance of several acts, in favor of the same person, at the same time, it is entire, and separate suits cannot be maintained to recover for its breach in

respect to each several act to be performed. Such was the contract in question, and an action for failure to construct the crossing is a bar to an action for a failure to erect the fences.

APPEAL from Henry Circuit Court.

C. W. Fairbanks for appellant.

Hemley & Brown for appellee.

MITCHELL, J.—On the thirty-first day of January, 1882, the Indianapolis, Bloomington & Western R. Co. and Davault Koons entered into a written contract, in which it was recited that, in consideration that Koons had conveyed to the railway company a right of way over certain lands owned by him, the latter agreed to maintain fences along the right of way so conveyed, and to construct and maintain a good and sufficient crossing over its road, with cattle-guards on each side. This suit was brought upon the contract. It was assigned, as a breach thereof, that the railway company failed to erect the fences according to the agreement, whereby the plaintiff sustained damages. It is alleged that the reasonable cost for the erection of the fences will be \$800, and that the plaintiff has sustained special damages by reason of the failure of the defendant, in that he has been for two years prevented from using his tillable and pasture lands lying adjacent to the unfenced right of way. The decree is predicated upon a former adjudication, whereby it is claimed the plaintiff's right of recovery on the contract is merged in a prior judgment. The answers alleged, in substance, that on the twelfth day of October, 1883, in the Henry Circuit Court, the plaintiff impleaded the defendant in a certain action on the same written agreement and cause of action, to which the defendant appeared, and that, by the consideration and judgment of the court on issues joined on a complaint on the same identical contract, the plaintiff recovered a judgment of \$40, which remains in full force, etc. To these answers it was replied, in substance, that in the former action the breach in the contract sued on, relating to the failure of the defendant to erect the fences, was withdrawn from and stricken out of the complaint before the jury retired, and that the finding and judgment in that case related solely to the breach of the contract in failing to construct the crossings and cattle-guards stipulated for in the agreement. A demurrer was overruled to this reply. Upon trial to a jury, a verdict was returned for the plaintiff. Over a motion for a new trial, judgment was rendered on the verdict. At the trial the defendant, in support of his special answers, offered in evidence the pleadings, record entries, and judgment in the former suit. Upon objection, this evidence was rejected as immaterial and irrelevant. The following entry appeared on the

record of the prior suit, as it was offered in evidence: "upon said plaintiff withdraws from the consideration of the suit and dismisses all claim for damages, except for the breach of contract in failing to make crossing."

The question for determination is, was the judgment rendered in the prior action a bar notwithstanding the dismissal of much of the complaint as related to the claim for damages for the failure to build fences? It was in the complaint in the first action that the railway company built its railroad over the right of way conveyed to it by the plaintiff, and that it had been running its cars since the first day of January, 1882. The railway company having, upon a consideration received by it, contracted to build fences, and having taken possession of the land, it became its duty, within a reasonable time, to comply with its contract. The duty to build the fences and to construct the crossing and cattle-guards, arose out of the contract. The obligation of the railroad company was to charge both stipulations within a reasonable time. Failing to comply with its contract within a reasonable time, the plaintiff was entitled to maintain an action for a breach of the contract to recover as damages the reasonable cost of erecting the fences and constructing the crossing. It was not necessary that he have first done the work which it was the duty of the railway company to do, before he could maintain the action. *Logansport R. Co. v. Wray*, 52 Ind. 578; *Lawton v. Fitchburg R. Co.*, 138 Mass. 230. Having a right to recover for the failure to complete the crossing, the plaintiff had at the same time the right to recover on the same contract for the failure to build the fences. Being so, it was not competent for him, after recovering the damages accrued in one suit, to maintain another suit on the same contract, to recover other damages which had accrued at the time the first judgment was rendered. A party will not be permitted to present, by piecemeal, in successive suits, claims which arise out of an indivisible, entire contract, and which might have been litigated and determined when the first suit was brought. The judgment by the first suit will be a conclusive bar to all other claims of all the plaintiff's rights under the contract.

The rule is well stated in the following language:

"Where the action is upon a contract, it merges all other claims under or arising out of the contract prior to the bringing of the first suit. They constitute a single indivisible demand. The plaintiff cannot be allowed to split up the various covenants or promises contained in one contract, and recover upon each separately." *Judgm. §§ 240, 272.*

In *Henderson v. Henderson*, 3 Hare, c. 115, the rule was stated as follows:

where a given matter becomes the subject of litigation in and adjudication by a court of competent jurisdiction, the court requires the parties to bring forward their whole case, and will not, under special circumstances, permit the same parties to open the subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward only because the party has from negligence omitted part of his case."

This salutary doctrine of the law is grounded upon principles which have become axiomatic, and which have often been applied by the court in cases involving claims arising out of contracts and torts to property. *City of North Vernon v. Voegler*, 103 Ind. 422; *Richardson v. Eagle Machine-works*, 78 Ind. 422; *Crosby v. Man*, 37 Ind. 264; *Ulrich v. Drischell*, 88 Ind. 354; *Ballard v. Lincoln Life Ins. Co.*, 81 Ind. 239; *Green v. Glynn*, 71 Ind. 504; *Wood v. Beymer*, 100 Ind. 504; *State v. Krug*, 94 Ind. 176; *Griffin v. Wallace*, 66 Ind. 410; *Spooner*, 45 Ind. 489.

In *Richardson v. Eagle Machine-works*, *supra*, it was said: "The plaintiff, having brought and prosecuted to final judgment an action for the defendant's breach of the contract sued on in this case, his remedy for that breach is exhausted. A party is not permitted to split up his cause of action, and bring a new action for the same breach of a contract, where, as in this case, damages might have been demanded and recovered in the first action."

This rule is applicable to all contracts which are entire and indivisible in their nature. Whether a contract is entire or not is determined by considering whether the obligation which it creates is to be discharged at different times, or to different periods, if parties have stipulated, in the same contract, that a debt is to be due in instalments, or that several distinct obligations are to be performed at different times, at stipulated periods, to different persons, the consideration for each separate being either expressly or impliedly apportioned, they have thereby made the contract divisible, in such sense that an action may be maintained on the contract to recover upon each separate stipulation as it matures or is broken. In such a case, the presumption would be that all such claims under the contract matured, and which might have been included in the action at the time it was commenced, were merged in the judgment. *Hill, supra*. Whether it might be shown, in such a case, that two or more of such claims as might have been included were brought on before judgment, we need not determine. Where, in a contract upon an entire consideration stipulates for the performance of several acts, in favor of the same person, at the

same time, such a contract is entire, and separate suits cannot be maintained to recover for its breach in respect to several act stipulated to be performed. *Lucesco v. Brewer*, 66 Pa. St. 351; *Logan v. Caffrey*, 30 Pa. St. 196; *v. Sturgis*, 16 N. Y. 548; *Cromwell v. County of Sac.*, 9-351.

Such claims constitute an entire, indivisible cause of action, a judgment therein is a bar to any subsequent action founded on such claims. *O'Beirne v. Lloyd*, 43 N. Y. 248; *Beloit v. M.*, 7 Wall. 619; *Stein v. Steamboat, etc.*, 17 Ohio St. 471; *v. McNairy*, 20 Ohio St. 315; *Dalton v. Bentley*, 15 Ind. Wells, Res Adj. § 240 *et passim*.

The contract between the railway company and Koons is entire and indivisible. When any breach of it was made, the performance, the breach was entire, so far as it remained to be performed, and but one action could be maintained for such breach. The withdrawal of a part of the claim in such a case, before judgment, cannot preserve the right to bring another suit for the balance so withdrawn. *Logan v. Caffrey*, *supra*, 2 Smith, Lea 669.

The reasons for withdrawing the claim which is made the subject of the present action, from the consideration of the court in the former suit are not disclosed. Whatever reasons have induced the withdrawal, since the claim has matured, and arose out of an entire indivisible contract, it cannot now be made the subject of a separate, independent action. If the court erroneously rejected evidence which was offered in support of the claim, the appropriate remedy of the plaintiff is to secure a reversal of the ruling by appeal. Having allowed the case to proceed to judgment, the measure of his rights under the contract are determined by that judgment.

The case is not within the ruling in *Block v. Ebner*, 54 Ind. The questions considered are presented by the assignment of error calling in question the ruling on the demurrer to the plaintiff's reply, and in overruling the motion for a new trial. If error in these rulings the judgment is reversed, with costs.

Enforcement of Contract to Fence.—See *Kentucky Cent. R. Co. v. 20 Am. & Eng. R. R. Cas.* 458.

Railroads—Fences—Ch. 193, Laws of Wisconsin, 1881, R. S. § 1810. **Constitutional**—Employee killed by Train running over Steer—Contributory negligence.—Ch. 193, Laws of Wis., 1881 (§ 1810, R. S.), which excludes defence of contributory negligence where a railroad company fails to fence its tracks, and an action arises for injuries resulting to person or property, is constitutional and valid, being within the police power. *Curry v. Western R. Co.*, 48 Wis. 665, and authorities there cited.

The plaintiff's intestate, though a conductor in the employ of the defendant company, did not waive all right to recover for injuries.

want of a fence, by continuing in the employment of the company must be presumed to have known that the statute protected him on those terms; and by continuing in his employment he only accepted the risks, not the possible danger of cattle straying upon the track. In this, he had a right to act upon the presumption that the company would proceed to perform, without unnecessary delay, the duty imposed on it by statute. *Quackenbush v. Wis. & M. R. Co.* (Wisconsin, 1885), 22 N. W. Rep. 519.

Horse on Bridge—Liability of Railroad Company.—A horse, which had turned loose by its owner, was found on the following morning on the track of the defendant company's road, where it had broken a leg by running between the timbers of the bridge. It was removed from the track and killed by the servants of the company. *Held*, that the company was liable, as it was not bound by law to keep the horse off the bridge by any other means. *Denver & Rio Grande R. Co. v. Chandler*, 8 W. Coast Rep. 10, October, 1885), 281.

Stock—Failure to give Signal—Evidence of Collision.—In order for a railroad company liable for injury done to stock at public crossings, engines and cars, it must be shown that its failure to ring the bell or sound the whistle concurred. Nothing short of an entire failure in the performance of these particulars will cast liability upon the company; and where there is evidence of a collision between a railroad train and an animal alleged to have been killed by such train, there can be no recovery. But such collision may not be shown by direct testimony, but may be inferred from the circumstances in evidence. *Halferty v. Wabash, etc., R. Co.*, 82

Stock—Signals—Prima-facie Case.—Proof of failure of a railroad company to ring the bell of its locomotive or to sound its whistle, as required by the statutes of Missouri, section 806, and of the killing of the stock, in a situation to escape if the signal had been given, makes a prima-facie case against the defendant. *Persinger v. Wabash, etc., R. Co.*, 82

Stock—Survival of Cause of Action.—A cause of action for the killing of stock caused by a railroad train; owing to the negligence of the company in not fencing its right of way, survives and may be assigned, and the assignee thereof may sue in his own name. *Wallen v. St. L. & Iron Mount. R. Co.*, Mo. 521, overruled; *Snyder v. Wabash, etc., R. Co.* (Mo. Nov. Term, 1885), 113.

Stock—Loss of Cattle—Statute of Limitations.—An action against a railroad company to recover damages for killing or injuring a domestic animal which had strayed upon its track, and was killed or injured without the negligence of the railroad company in operating its train, but solely on account of its neglect to fence the road as required by law, is founded upon "a liability created by statute, other than a forfeiture or penalty," and is barred by the statute of limitations. *Seymour v. Pittsburgh, etc., R. Co.* (Ohio, Jan., 1886), 4 N. W.

Stock—Complaint—Evidence.—In an action, under the statute, against a railroad company, for killing stock, the want of a formal averment in the complaint, that the plaintiff was damaged by the killing of his cattle, is not an objection, for any purpose after verdict. Upon question of damages, the court will allow witnesses to testify as to the value of animals before the injury. *Louisville, etc., R. Co. v. Peck*, 99 Ind. 68.

Stock coming on Track through Defective Gate-fasting.—*See* *R. Co. v. Fetterling*, 20 Am. & Eng. R. R. Cas. 454.

Crossing—Duty of Company to those for whose Benefit it is maintained.—In an action to recover damages for the killing of two

colts, which entered the defendant's right of way through the north one of two gates maintained for the benefit of the plaintiff and four other persons who owned a pasture adjoining the defendant's road, the court after stating the case proceeded substantially as follows: "It is true that the place of entry is the important question, but it is not true that it must be shown by positive evidence; it is sufficient if circumstances are proved from which the fact can be legitimately inferred. Indianapolis, etc., Co. v. Thomas Collingwood, 71 Ind. 476; Indianapolis, etc., Co. v. Thomas, 84 Ind. 194; Louisville, etc., Co. v. Kious, 82 Ind. 357; Whitewater R. Co. v. Bridgett, 94 Ind. 216.

The plaintiff has the burden of showing that the place where his animals entered was not securely fenced; but, where the railroad company asserts that the place was one which it was not bound to fence, it must affirmatively establish that fact. Fort Wayne, etc., Co. v. Herbold, 99 Ind. 380, and authorities cited; Baltimore, etc., Co. v. Kreiger, 90 Ind. 380.

It was for the appellant, therefore, to show that the place where the animals of the appellee entered was one which it was not bound to fence. The general rule is that railroad companies are bound to maintain fences at private crossings. Indianapolis, etc., Co. v. Lowe, 29 Ind. 545; Cincinnati, etc., Co. v. Ridge, 54 Ind. 39; Indianapolis, etc., Co. v. Thomas, 84 Ind. 194; Baltimore, etc., Co. v. Kreiger, *supra*; Railroad Co. v. Cunningham, 39 Ohio St. 327. To this general rule there are exceptions; the duty to fence is not owing to one who has undertaken to maintain the fence, nor to one for whose benefit the private crossing is maintained. Terre Haute, etc., Co. v. Smith, 16 Ind. 102; Indianapolis, etc., Co. v. Shimer, 17 Ind. 295; Bond v. Evansville, etc., Co., 100 Ind. 301.

"The decision in the case last cited controls here, for, although the appellant used the south crossing, still the north one was maintained for the benefit of those with whom he was united in interest, and it is impossible to sever their interests. All were interested in the crossing, and no one of them can maintain an action for a loss resulting from the failure to keep the gate constantly closed. The duty of the railroad company to those for whose benefit it permits the crossing to be maintained is very different from that which it owes to other persons and the public. So far as concerns those for whose benefit the private way is maintained, its duty does not extend so far as to require it to exercise constant vigilance to keep the gate closed." Evansville & T. H. R. Co. v. Mosier, 1 N. E. Rep. (Ind.) 197.

Injury to Sheep through Gate being left Open—Liability.—Where an injury resulted to a flock of sheep from the act of some person opening, and leaving open, the gate to a pasture in which the sheep were, thus permitting them to enter upon the defendant company's right of way, it is held that, if the gate was opened, or left open through the negligence or carelessness of the servants of the defendant, it is liable for any injury resulting therefrom; but, if it was opened and so left by any other person through negligence or design, the defendant is not liable. Lemon v. Chicago & G. T. R. Co., 26 N. W. Rep. (Mich., Feb. 1886), 791.

NEW YORK, CHICAGO AND ST. LOUIS R. CO.

v.

AVER.

(*Advance Case, Indiana. April 15, 1886.*)

A person in possession of property, as live-stock on pasture, under an agreement making him accountable for it, or for any injury to it, except such as may happen from natural causes, is an "owner" in such a sense that he may recover for the killing of such stock by a railroad company.

APPEAL from Kosciusko Circuit Court.

Frazer & Frazer for appellant.

Marshall & McNaguy for appellee.

MITCHELL, J.—Aver recovered a judgment against the railroad company for \$109.50, the value of sheep killed and injured on the company's right of way. The appellant claims a reversal, on the ground that the appellee was not the owner of the sheep. The facts were found by the court, and were as follows: In the fall of 1882, Daniel Bros. delivered 23 sheep to the plaintiff, under the following arrangement: Aver was to receive the sheep and keep and care for them on his farm. He had the right, at his pleasure, to return the identical sheep received, and was to deliver one half the increase and one half the wool to Daniel Bros. If any of these originally delivered, or of the increase, died of disease, or from natural causes, it was agreed that such loss of those delivered, and of one half the increase, should be borne by Daniel Bros. If any of the sheep should stray away and be lost, or if any should be killed by dogs, or otherwise hurt or injured, Aver was to account for their value. The remainder of the increase were to be his property while he had them in possession. Before those received had been returned, or any division of the increase made, the flock escaped out of Aver's possession, through a defective fence, to the defendant's right of way. Nineteen were killed by the cars, and four injured. Of those killed three were of the number received from Daniel Bros. The remainder were of the undivided increase. Upon the facts found the court stated, as a conclusion, that the plaintiff was entitled to recover the value of the sheep killed and injured.

The statute which imposes liability on railroad companies for stock killed, gives the right of action to the owner of the stock.

The question here is, who was the owner? As to the und
 WHO IS AN INCREASE, OWNERSHIP WAS IN THE PLAINTIFF. THIS
 OWNER OF STOCK the principle applied in analogous cases in whi
 relation of landlord and tenant exists. The holding in such
 uniformly is that the title to the whole of that which is to
 delivered as rent remains in the tenant until delivery is made
 is regarded as the owner. For an injury to the property wh
 in possession of a tenant he is entitled to maintain an ac
 owner. *Chicago & W. M. R. Co. v. Linard*, 94 Ind. 3
 cases cited. The case cited and those referred to are not
 guishable in principle from the one under consideration.
 common law an agister had such title, in virtue of his pos
 as enabled him to maintain trespass or trover for an injur
 conversion of the cattle. *Story, Bailm. § 443*. Whether o
 ing animals in agistment, with no such special agreement
 appears in the case before us, could maintain an action as ow
 need not determine. Under the arrangement set out in the
 finding it clearly follows the plaintiff was the owner.

On behalf of the appellant it is contended that the right
 session which the appellee had did not invest him with
 owner. Reliance is placed upon the definition of the
 "owner." "Owner," as defined by Bouvier, is: "He v
 dominion of a thing, real or personal, corporeal or incorporea
 he had a right to enjoy and do with as he pleases, even to
 destroy it," etc. Within the definition above given, we
 under the contract, Aver was the owner of the increas
 Daniel Bros.' share was delivered to them.

BAILLIE HELD "OWNER." complete dominion of them, even to the exclu
 Daniel Bros. He was absolutely accountable for the who
 ber. If he could show that some died of disease or from
 causes, as to those so accounted for he was exonerated from
 their value. Until the share to which Daniel Bros. were
 was ascertained and delivered to them, they were not joint
 with the plaintiff. If they had taken possession of the shee
 out his consent, he could have maintained replevin agains
 and if they had sued for the injury, the railway compan
 have successfully defended on the ground that Aver
 owner.

As to the three which were of the number originally r
 the conclusion that the plaintiff was entitled to recover f
 loss was also correct. When the sheep were killed or inju
 plaintiff was at once liable to Daniel Bros. under his c
 They could have maintained a suit against him directly.
 case of *Welty v. Indianapolis, etc., R. Co.*, 4 N. E. R.
 (present term), it was held that the borrower of the anim
 was injured while in his possession stood in the relation o

to the company on whose right of way the injury occurred. When one is in possession of property under such an arrangement that he is accountable for it, or for any injury to it in any event, such person may sue to recover for any loss or injury done the property while it is so in his possession. In such a case the person in possession is treated as the owner, and is entitled to all the rights of an owner. *Louisville, N. A. & C. R. Co. v. Goodbar*, 88 Ind. 213; *Fuller v. Curtis*, 100 Ind. 237; *Story, Ag. § 398*. As the plaintiff had the exclusive right of possession of all the sheep, and was liable absolutely and at once for the value of those killed or injured, he was fairly the owner, within the meaning of the statute.

Judgment affirmed, with costs.

CHICAGO AND EASTERN ILLINOIS R. Co., Appellant,

v.

GUERTIN.

(*Advance Case, Illinois. January 25, 1886.*)

A railroad company erected a fence with a gate a few feet off its right of way and maintained it for a number of years, treating it as a part of the fence which the law required it to maintain, and then neglected it. *Held*, that, *prima facie*, it was the duty of the company to keep said fence and gate in repair, and that it was its duty to do so at least until it had given formal notice to those interested to the contrary.

In an action to recover damages for injuries to stock caused by the neglect of the company to keep said fence and gate in repair, evidence to prove that the erection of a fence or cattle-guards at the point in question would endanger the lives of the company's employees and inconvenience the public in transacting business with the company, is inadmissible, as immaterial to the issue.

An appeal to this court upon a certificate of the judges of the appellate court stands here on the same footing as appeals given by the statute as matters of right.

APPEAL from the Appellate Court, second district. Affirmed.

Action for damages to plaintiff's meadow by fire and for death of plaintiff's stock alleged to have been caused by neglect of defendant.

The case is sufficiently stated in the opinion.

W. Armstrong for plaintiff.

C. R. Starr for defendant.

TUNNICLIFF, J.—The appellee brought his action in case against appellant in the Kankakee Circuit Court, and in various counts of his declaration sought to recover: 1, for the

FACTS. destruction of three acres of timothy meadow, alleged to have been caused by appellant's locomotive having set fire to his right of way, which communicated with and destroyed the timothy stubble; 2, for the killing of two steers by appellant's train on the crossing at Guertrain Street; and 3, for the killing of two head of cattle and a stallion colt, which is alleged to have occurred in consequence of the railroad company having suffered its gates and bars to get out of repair, and by means whereof they strayed upon the track and were struck by appellant's locomotive and killed.

A trial resulted in a verdict and judgment for appellee for \$90, which judgment was affirmed by the appellate court for the second district, and the judges of that court having certified that the case involved questions of law of such importance that it should be passed upon by this court, the appellants were allowed a further appeal. The appellate judges have certified several questions of law to be passed upon. This was unnecessary.

When an appeal is perfected to this court, whether in cases where it is given by the statute as a matter of right or in those cases where it is allowed only upon the certificate of at least two of the judges of the appellate court, that it involves questions of such importance that it should be passed upon by this court, the practice here is the same in both cases, and the appellant may assign any errors of law which he may consider presented by the record. The case being properly in this court, the manner in which it was brought here is immaterial, and it will stand on the same footing as all other cases.

In this case the finding of the jury was general, without specifying upon which count or counts, or for what injury they found the defendant guilty. But from the amount of the verdict which was less than the evidence tended to show the colt was worth, as well as from the other evidence in the case, and instructions of the trial court, and the presumption that should prevail to sustain it, we conclude that the jury only found for the appellee damages for the killing of the colt.

The evidence tends to show that this colt had been running in appellee's pasture east of the railroad track and grounds; that it escaped therefrom by reason of a defective gate in the fence, and got upon appellant's railroad track and was struck by its locomotive and killed.

Appellant urges that it should not be held responsible because the fence was not on the line of its right of way, and that it was not bound to fence the road at this point. It is true this fence

**PRACTICE—AP-
PEAL OR CERTI-
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PELLATE COURT.**

FENCE.

was a few feet from the line, and upon the grounds of appellee, but appellant had erected the fence and gate through which the colt had escaped and kept it in repair a number of years, and then neglected it. It had treated this fence and gate as part of that which the law required it to build along its right of way, and having done so, the appellee, we think, had the right to rely upon its maintaining it and keeping it in repair, and that it was its duty to do so until it had given him formal notice that it considered itself absolved therefrom, and should no longer maintain or repair the same.

The statute requires that every railroad which has been in operation six months shall be fenced by the railroad company suitably to prevent cattle, etc., from getting on the rail- STATUTE. road, except at the crossing of public roads and highways, and within such portions of cities and incorporated towns as are platted into lots, with gates or bars at farm crossings, etc. § 1, Act 1874.

The place where the colt went through the defective gate upon the railroad track was not one of those mentioned in the statute releasing the company of that duty; in other words, it was not one of the excepted places. *Prima facie*, then, it was the duty of the company to keep the fence and gate in repair at this point so as to prevent the escape of stock, and this duty it undertook to and did discharge for a number of years, but of late has neglected to do so. It now claims, as we understand it, that it should be excused from the performance of this statutory duty, because of the counter and higher duty it owes to the public to keep its depot grounds open for the use and convenience of those having business with the road, in accordance with the principle announced in the case of C., B. & Q. R. Co. v. Hans, 111 Ill. 114.

Whether the railroad company could not transact its business and operate its cars with safety to its employees, or the convenience of the public be as well subserved with or without this ESTOPPEL. fence and gate remaining as it was originally erected, were questions of fact which the company ought to be estopped from controverting so long as it permits it to stand and be used and relied upon by others as a fence which the statute by its plain reading *prima facie* requires it to build and keep in repair. Certainly so until they have given notice to parties interested to the contrary, and thus give them a reasonable opportunity to build their own fence.

The principal point apparently relied upon by counsel for appellant for a reversal, and which he has very ably and elaborately argued, concerns the exclusion of certain evidence offered on behalf of the company on the trial of the EVIDENCE, ADMISSIBILITY OF. cause. The station and switch grounds of the company were ad-

adjacent to and extending north and south past the place where the fence and gate was on its east side, and through which the stock escaped. Appellant offered to prove that the erection of cattle-guards or a fence along its side track, on these grounds, and its switch stands, one of which was north and the other south of the gate, would greatly endanger the lives of its employees, and would in the transaction of its business be compelled to switch on and along the side tracks upon these grounds, and in attending to the switching would run great risk of being caught in the tracks by the cattle-guards; and that such a fence and cattle-guards would greatly inconvenience the public at large in loading and unloading freight on the side track in the business of shipping freight; and that the erection of other cattle-guards there would weaken the roadbed and endanger the lives of passengers. A majority of the court held the opinion that this evidence was properly excluded, and that the reason that appellee's cause of action was not based upon the neglect of appellant to erect cattle-guards, or build fences along its side tracks on its station grounds, but so far as any relevant evidence had, for a failure to keep in repair a fence, or gate formerly built of the same, already built at or near its right of way, by which whereof appellee's stock escaped from his pasture and went upon appellant's track and was killed by its locomotive; and that the evidence offered was immaterial to the issue being tried.

The judgment of the appellate court is affirmed.

Railroads—Injury to Stock where there is no Fence and no Statute.—**No Presumption of Negligence.**—In an action against a railroad company to recover damages for alleged negligence in killing a mule, there being no statute requiring the company to fence its tracks, the plaintiff has no evidence to prove negligence by the servants of the defendant. The simple fact of injury to the animals by the trains of the company, unaccompanied by anything which tends to show positive negligence on the part of the agents of the railroad, is insufficient to charge the railroad. This is the rule in those States where the company is not bound to fence its track, and where the stock is permitted to run at large upon the lands without thereby subjecting the owner to liability as a trespasser. *Bethje v. Houston, etc., R. Co.*, 26 Tex. 604; *C. & P. & St. L. R. Co. v. McMillan*, Ohio (S. C.), 7 Am. & Eng. R. R. Cas. 588; *McKissick v. St. L., K. C. & N. R. Co.*, 78 Mo. 456; *Mobile, etc., R. Co. v. E. & A. R. Co.*, 572.

The mere fact of the killing or injury does not constitute any presumption of negligence; the specific negligent act complained of must be proved by the plaintiff. *Atchison, T. & S. Fé R. Co. v. Walton*, 9 West. C. (N. Mex.) 112, citing *Lyndsay v. Conn., etc., R. Co.*, 27 Vt. 643; *Chicago & N. W. R. Co. v. Patchin*, 16 Ill. 198; *Great Western R. Co. v. Morthland*, 451; *Schneir v. C., R. I. & P. R. Co.*, 40 Iowa, 387; *Indianapolis & N. E. R. Co. v. Means*, 14 Ind. 30; *New Orleans R. Co. v. Enochs*, 42 La. 207; *Mobile, etc., R. Co. v. Hudson*, 50 Id. 572; *Grand Rapids R. Co. v. Brown*, 35 Mich. 507; *Brown v. Hannibal, etc., R. Co.*, 38 Me. 309; *Wilmington R. Co.*, 4 Jones L. 432; *Walsh v. Virginia, etc., R. Co.*, 111; *Flattes v. Chicago, etc., R. Co.*, 35 Iowa, 191; *Kentucky, etc., R. Co.*, 111.

v. Talbot, 78 Ky. 621; *Whittier v. C., M., & St. P. R. Co.*, 26 Minn. 484; *Little Rock, etc., R. Co. v. Henson*, 39 Ark. 418; *Little Rock, etc., R. Co. v. Holland*, 40 Id. 336.

Injuries to Stock—Negligence Imputed to the Company under Md. Statute—Contributory Negligence.—Under art. 77, sec. 1, Code of Public General Laws of Md., in an action against a railroad company for an injury to stock, this negligence must be imputed to the company defendant, and the *onus probandi* in negation of this imputation is on said company, and it must show that the injury complained of resulted from a disaster which could not have been avoided by the use of proper care and diligence, and that such proper care and diligence had been observed by its agents. *Balto. & Ohio R. Co. v. Mulligan*, 45 Md. 486; *West. Md. R. Co. v. Carter*, 59 Md. 306; *s. c.*, 11 Am. & Eng. R. R. Cas. 482.

The effect of the statute is to relieve the plaintiff from the obligation which the common law imposes. It is no longer incumbent on him, in the opening of his case, to show affirmatively the negligence of the defendant. The duty rests on the defendant to supply proper and adequate proof in rebuttal of the presumption of negligence. In other words, it must be assumed that the injury sustained was caused by the defendant's negligence, in the absence of satisfactory and sufficient proof to the contrary. The defendant may supply this proof by showing a state of facts demonstrating care and caution on the part of its agents; and it may also show that the accident resulted from negligence on the part of the plaintiff.

In the cases above cited, it is held that a plaintiff may have allowed his stock to stray at large, unattended, without being guilty of such contributory negligence as would preclude his right to recover, if the accident could have been avoided by the use of proper care on the part of the defendant's agents. In the case presented by this record it was obviously within the province of the jury to find whether, at that particular time, the stock was properly on the road, the plaintiff occupying land on each side of the railroad, and being compelled to use the established crossing as a place of transit from one lot to another. *Northern Central R. Co. v. Ward*, 68 Md. 362.

Railroads—Maintenance of Fences already Erected—Reasonable Time to Repair.—In an action to recover double damages for the killing of a cow alleged to have been caused by a failure of the defendant company to maintain a good and sufficient fence as required by law, the court, after stating the case, proceeded substantially as follows:

"In the case of *Clardy v. Railroad Co.*, 78 Mo. 576; *s. c.*, 7 Am. & Eng. R. R. Cas. 555, it was held by this court that "after fences have once been erected, as required by law, the company is only liable for a negligent failure to maintain such fences, and it is, therefore, entitled to a reasonable time in which to make repairs, after having knowledge of a defect therein, or after that period has elapsed, in which by the exercise of reasonable diligence, it could have had knowledge of such defect." This rule has been reannounced in the following cases: *Case v. Railroad Co.*, 75 Mo. 670; *Chubbuck v. Railroad Co.*, 77 Mo. 592; *s. c.*, 18 Am. & Eng. R. R. Cas. 653; *Rutledge v. Railroad Co.*, 78 Mo. 286; *s. c.*, 19 Am. & Eng. R. R. Cas. 669; *Silver v. Railroad Co.*, 78 Mo. 528; *s. c.*, 19 Am. & Eng. R. R. Cas. 642; *Walters v. Railroad Co.*, 78 Mo. 617; *s. c.*, 19 Am. & Eng. R. R. Cas. 662. As it appears that the defendant had once erected fences on the sides of its road, at the point in question, it could only be held liable for a negligent failure to maintain such fence, and it devolved upon the plaintiff to introduce some testimony from which it could, at least, be fairly inferred by the jury that the defendant had been guilty of negligence in this particular." *Young v. H. & St. J. R. Co.*, 82 Mo. 428; *Chubbuck v. Railroad Co.*, 77 Mo. 592; *s. c.*, 18 Am. & Eng. R. R. Cas. 653.

Injury to Stock—Burden on Plaintiff to show that Entry was at Point of Fence is required.—In actions against railroad companies to recover damages for killing stock, it is held that the burden is on the plaintiff in cases of this character, to prove that the animals entered at a point where the railroad company was bound to fence, and that at that point there was no fence. It is the place of entry that controls. As said in *Watson v. Co. v. Tretta*, 96 Ind. 450; s. c., 19 Am. & Eng. R. R. Cas. 601: "The place of entry is the material question." This is the ruling in many cases: *Wayne, etc., Co. v. Herbold*, 99 Ind. 91; *Lake Erie, etc., v. Kneadler*, 100 Ind. 454; s. c., 19 Am. & Eng. R. R. Cas. 568; *Louisville, etc., Co. v. C. & O. R. Co.*, 101 Ind. 295; s. c., 19 Am. & Eng. R. R. Cas. 595; *Louisville, etc., Co. v. Overman*, 88 Ind. 115; s. c., 18 Am. & Eng. R. R. Cas. 648; *Jeffersonville, etc., Co. v. Lyon*, 72 Ind. 107; *Toledo, etc., Co. v. Howell*, 88 Ind. 44; *St. Louis, N. A. & C. R. Co. v. Goodbar*, 102 Ind. 599.

BURLINGTON AND MISSOURI RIVER R. Co.

v.

CROCKETT.

(*Advance Case, Nebraska. February 11, 1886.*)

The under-boss of a gravel-train gang was directed by his immediate superior to take men and dig out a car which had been partly covered over by a fall of gravel from a high bank near by. He proceeded to dig out the car, and while so employed was killed by the embankment falling. Prior to that time the custom had been to station a watchman to guard the workmen of danger from the falling bank, but this was omitted on this occasion. *Held*, that the company was liable.

A gravel-train conductor on a railroad, with a gang of men under his immediate control in the employ of the railroad company, is, as to the company, the vice-principal of the railroad company, and not their fellow-servant.

A sub-boss under the immediate control and direction of the conductor, and not, as to such conductor, a fellow-servant.

ERROR from Lancaster County.

Marquette & Deweese for plaintiff.

Sawyer & Snell and *J. R. Webster* for defendant.

MAXWELL, C. J.—An opinion was filed in this case at the term of the court, judgment being reversed for want of a proper allegation in the petition. Afterwards the parties entered into a stipulation that the petition be amended, and the case again submitted, either party to have leave to file an amended brief. The action is brought by the plaintiff, the mother

born Crockett, as administratrix of his estate, to recover damages for his death, caused by the caving of an embankment at a gravel pit where he and others were at work for the railroad company. The plaintiff below (defendant in error) claims to have established two propositions by the evidence, which she alleges are sufficient to sustain the verdict: First, that Crockett was under the control of one Wyatt, and was ordered by him to shovel out a certain car near the embankment, which car had been partially covered up and derailed by a fall of earth; and, second, that it has been customary to place a watch at or near the bank, to give warning when it was apparent that it was about to fall, which precaution was omitted on this occasion. It is contended on behalf of the plaintiff in error that neither of these propositions is supported by the evidence. This will require an examination of the testimony.

It appears from the testimony that for some months prior to November 18, 1881, when the accident occurred, Clayborn Crockett had been in the employ of the railroad company as under-boss of the shovellers of a gravel train, which at the time of the accident was being loaded with gravel at an embankment near Milford, to be carried to Lincoln; that an ordinary day's work was 60 cars, which required three trips; that the embankment in question is about a mile and a half east of Milford, and on the south side of the track, and is reached by a spur or side track from the main line, the bank at the highest place being from 20 to 30 feet in height; that on the day the accident occurred a number of the hands were absent,—the exact number does not appear,—and there seems to have been an attempt on the part of the conductor (Wyatt) to accomplish the usual amount of work; that before noon there was a fall of earth from a high part of the bank, which struck one of the flat cars, and partly buried it, and threw one end off the track.

The attorney for the plaintiff in error who argued the case insists that there is no evidence to show that Wyatt ordered Crockett to shovel out the car and get it on the track.

One Jerry Wilson testified (page 7) as follows: "State to the jury if you know how Clayborn came to go there to unload that car. *Answer.* It was a custom when we got in a pinch for Mr. Wyatt to help us out. *Question.* This Wyatt was in charge of the train? *A.* Yes. *Q.* And Clayborn had charge of the men? *A.* Yes; Mr. Wyatt was a piece off, getting a tie to bear the car on the track, when it fell. *Q.* How far off had he gone? *A.* Fifty or a hundred yards. When he started away he said to Clayborn: 'Go and get that car out as quick as you can.' He always said to Clayborn: 'Go and do so and so.'"

One Calvin J. Montgomery testifies (page 9): "After that bank had fallen, in the morning, the same day John Wyatt (six or seven of the cars were loaded) told Clayborn to take those men and go

there and clear up the tracks and get the cars ready by the time the Milford train came. Clayborn did so, and he worked there till dinner. After dinner we came back, and he said to go and take some men and go back and clear the track. He was digging under the tracks, and the bank caught him in this way. [Witness illustrates the position.] The bank was on the south side and the track on the north side. Before dinner we did not finish clearing out. After dinner he (Wyatt) told him to take some of the men and clear it, and he would go and get a tie. He (Wyatt) went to the tool-box and got a tie, and had it on his shoulder, and before he got back the accident occurred."

S. Black testified (page 13) as follows: "*Question.* What happened to one of the cars that day? *Answer.* The bank had fallen down on it, and knocked one end of the car off the track. *Q.* What was being done that day? *A.* Dug out part of it. *Q.* Who dug it out? *A.* The men working for Crockett. *Q.* How did it come that these men and Crockett were digging it out? *A.* Wyatt told them to."

Joseph Carter testified (page 16): "In the forenoon there was a part of the bank fell down, and broke the brake, and then we were shovelling that out so that we could get the train out at the usual time. *Question.* Who told you to shovel out that car? *Answer.* Wyatt. *Q.* Whom did he tell? *A.* All of us. *Q.* Did he tell any particular person? *A.* He told Mr. Crockett."

J. Mitchell testified (page 19): "*Question.* You may tell the jury who were at work there at the car next to the bank when the accident happened at the time. *Answer.* Myself, this Mr. Crockett,—he was in the centre of the car next to the bank,—and there was another man, Robert Reed. We were the only three men engaged in there at that time. The rest of the men were loading up the other cars. *Q.* How did you come to load up that car? *A.* There were four or five more cars below that had been loaded. This car, we commenced loading it in the morning. It was very cold that morning. We did not finish loading it, because about eleven o'clock the bank caved in there, and had knocked it partially off the track, and broke the brake-wheel. In the afternoon, when the men were called out and had gone to work, Mr. Wyatt, I believe, gave orders to some of them to finish loading the car, and none of them would agree to load it except us two men. They were afraid that the bank would cave again, but myself and another man and Mr. Crockett were at the upper end of the car, and Mr. Wyatt was down there, and he left our car and went to Crockett. I don't know what he said. Anyhow Crockett came down and pitched in. . . . *Deweese.* You did not hear what he said to Crockett? *A.* No; he came down immediately, and he was engaged in helping us load that car. We had been loading it, I believe,

for three quarters of an hour before the bank caved in. *Q.* The second time? *A.* Yes; that was the second time."

Mr. Wyatt, called as a witness by plaintiff in error, testified on cross-examination as follows (pages 30, 31): "*Question.* At the time of this accident were where you when the first fall of dirt occurred on that day? *Answer.* I was about two cars from the men when the dirt fell. *Q.* What direction? *A.* I was west. *Q.* What were you doing? *A.* Carrying water around for the men. *Q.* Then what did you do when the dirt fell? *A.* I don't remember that I did anything in particular. Well, I moved a part of the men from the other side. *Q.* What did you do then? *A.* Then told Crockett that we would have to clear the dirt from the car and get it on the track where the engine came. *Q.* Did he proceed to clear up the dirt? *A.* Crockett and two men. *Q.* You said that 'we'? *A.* I meant that the dirt would have to be cleared away. *Q.* Did that mean yourself? *A.* It did if I had to go there. *Q.* Did you go? *A.* No, sir. *Q.* Did he go? *A.* Yes. *Q.* Did you tell him to take men? *A.* He had the privilege himself to take men. *Q.* Did you tell him to go and clear the cars? *A.* No, sir. *Q.* Was that the manner in which you were accustomed to give your orders there? *A.* Not at all times. *Q.* But on this day that is the way you spoke? *A.* Yes; as a general thing I speak that way,—that we would have to do so and so." He also testifies that the effect was that of a command to go and do what was required. There was a great deal of other testimony by the same witnesses tending to show that just before the accident *TESTIMONY SUFFICIENT TO WARRANT VERDICT.* Wyatt directed Crockett to clear the dirt away from around the car which had been derailed, and that while thus engaged the bank caved, and fell on him, causing his death. The objection that the testimony is not sufficient on that point to warrant the verdict is not sustained.

2. That the testimony fails to show that it had been customary to keep a watch to notify the shovellers that the bank was about to fall, and at the time of the accident this precaution had been omitted.

Joseph Carter testifies on that point as follows (pages 15, 16): "*Question.* State to the jury what had been the custom of the company about protecting the employees from danger resulting from caving in, if anything. *CUSTOM OF KEEPING WATCH-MAN.*

Answer. Always up to that time there was some one on the bank watching, and seeing if there was any danger, and if there was any danger there was always notice given, so we got out of the way in time, and none were hurt. *Q.* Who would station them up there? *A.* Mr. Wyatt. . . . *Q.* Had anybody been stationed up there to watch and give warning this day of the accident? *A.* No, sir; nobody was there that day, at all." In this the witness is cor-

roborated by nearly all the others. Mr. Wyatt testifies, on examination, as follows: "*Question.* That was your custom to go along there, and when it became dangerous to tumble the cars down? *Answer.* When we got through the gravel we threw the cars down the bank. If we thought there was any danger we would throw the cars down the bank. *Q.* You would in both cases? *A.* Yes. *Q.* Would you have men stationed up there on the bank if it was dangerous? *A.* Not on the top of the bank. *Q.* Anywhere else? *A.* Not on the top of the cars. *Q.* Did you ever perform that duty? *A.* Yes. *Q.* And you would undertake to give warning to the men if it was dangerous? *A.* Yes. *Q.* You would take a position on the bank and if you saw any cracks you would tell the boys to get down? *A.* If I saw any move in the bank; yes, sir. *Q.* On this day were you not watching the bank? *A.* Was not at the time the cars fell, or had not been that day."

There is no proof whatever that Crockett knew that there was no one watching the bank. The position was a dangerous one, and this seems to have been known to Crockett; but with a man to give warning that the bank was about to fall, one of the witnesses testifies that the shovellers could get upon the bank and escape injury. Had the usual watch been kept, this accident probably, would not have occurred. There is sufficient proof of negligence, therefore, to sustain the verdict. But it is said that Crockett was a fellow-servant with Wyatt, and that the servant assumes all of the risk of danger that is apparent. This question was decided before this court in Chicago, St. P., M. & O. R. Co. v. Lunken, 16 Neb. 254; s. c., 21 Am. & Eng. R. R. Cas. 528. In that case it was held that a conductor of a construction train on a railroad with a gang of men engaged to work as day laborers for the railroad company, but under the immediate orders of such conductor, is as to such men the vice-principal of the railroad company, and not a fellow-servant of such men; and an act of gross negligence on the part of such conductor, whereby the lives of such men are placed in jeopardy while working under his immediate orders, is in that direction, and one of them was killed, was the negligence of the company, for which it was liable. That case was ably argued by the attorneys in the case furnished elaborate briefs, which contained references to the leading authorities up to that time, and a decision was not reached until the authorities *pro* and *con* had been carefully considered; and now, after the lapse of one and a half years, we see no reason to change our decision. That decision, therefore, will be adhered to, and it is decisive of this case. Crockett, although an under-boss of the hands, was under the immediate direction of Wyatt, who was the responsible head of the company represented the company. So far as the necessity of having a watchman Wyatt was concerned, Crockett seems to have been in precise

condition as any of the other workmen. To all intents and purposes he was one of them. The testimony tends to show that he was an intelligent colored man, about twenty-four years of age, that he was sober, industrious, and, so far as appears, a man of good character in all respects; that the plaintiff was largely dependent upon him for support, and that he was in the habit of sending her from \$15 to \$25 each month from his wages. The verdict was for \$925, a sum that would seem to be much in excess of the plaintiff's damages; but, as no complaint is made on that ground, it cannot be considered here. Upon the whole, we find no error in the record, and the judgment is affirmed.

BALTIMORE AND OHIO R. Co.

v.

McKENZIE.

(*Advance Case, Virginia. November 12, 1885.*)

Express messenger employed by the Baltimore & Ohio R. Co. was injured in a collision of the train on which he was running with a large rock which had fallen from the side of a cut upon the defendant's track. Judgment against the company was affirmed, the court holding—

That one who enters the service of another takes upon himself the risks of the negligent acts of his fellow-servants in the course of employment except (a) where the master himself is not free from negligence, for example, provided unsafe machinery, etc., or (b) where the injury is caused by the negligence of a servant who is charged with the performance of duties which by law it is incumbent upon the master to perform, the servant being the representative of the master.

That a section hand might properly testify that he told the section boss if he did not take out that rock,—meaning the rock which fell—“it would be a thundering crash some day,” that he did not know whether the section boss heard the remark or not, but supposed he did, as the rock was made near enough to hear it.”

That another witness might properly be permitted to testify that he was told by one Foster, a night-watchman of the company, just as he was about the “cut,” that he had that evening seen water running under the rock, and that the rock was dangerous.

That both the section boss and the night-watchman were representatives of the company to whom notice would be notice to the company.

That where a defendant relies upon contributory negligence as a defense, he must prove it, and in the absence of proof to the contrary, plaintiff will be presumed to have been without fault.

(6) That the question of negligence is one for the jury to determine.

(7) That where a railway company does its own express business, its express messengers are co-servants with the engineer and other subordinate employees on the train.

(8) But that in this case the question whether the engineer and express messenger are fellow-servants is a mixed question of fact and law to be submitted to the jury.

(9) And that the jury must weigh all the testimony in determining the negligence of the defendant.

(10) And further, that an instruction warning the jury from "feelings of sympathy, compassion, and charity, and against making any extravagant allowance growing out of" such feelings, is not open to the objection that it leaves the jury to infer that they were free to make an extravagant allowance from any other feelings, such as passion or prejudice.

ERROR to the Circuit Court of Shenandoah County. Case heard at Staunton. The opinion states the case.

Sheffey & Bumgardiner for plaintiff in error.

H. C. Allen and W. R. Alexander for defendant in error.

LEWIS, P.—This was an action of trespass on the case in the Circuit Court of Shenandoah county, wherein the defendant in error here was plaintiff, and the Baltimore & Ohio R. Co., the plaintiff in error here, was defendant. The action was brought to recover damages for injuries received by the plaintiff while in the

FACTS. performance of his duties as an express messenger in the employ of the defendant company. The injuries so received resulted in the loss of the plaintiff's left arm, and were occasioned by a collision of the train upon which the plaintiff was, with a large rock which had fallen from the side of a cut upon the defendant's track. It was claimed, and the jury found, that the collision was caused by the negligence of the defendant's agents, without fault on the part of the plaintiff, and judgment, in accordance with the verdict, having been rendered in the plaintiff's favor, the case is now here on a writ of error and *superseas*.

It is a general rule of law, well settled in England and mostly in this country, that one who enters the service of another takes upon himself the ordinary risks of the negligent acts of his fellow-servants in the course of the employment. In other words, the master is exempt from liability to his servants for the fault of their fellow-servants.

The leading case on the subject is *Farwell v. Boston & Worcester R. Corporation*, 4 Met. (Mass.) 49; and the rule as there announced by Chief-Justice Shaw has since been acted on in numerous cases, English and American. See *Randall v. Balt. & Ohio R. Co.*, 109 U. S. 478; s. c., 15 Am. & Eng. R. R. Cas. 243, and cases cited.

There are exceptions, however, to the general rule as well estab-

**RISKS ASSUMED
BY SERVANT.
AUTHORITIES.**

lished as the rule itself. Thus, the master to be exempt from liability must himself have been free from negligence. He EXCEPTIONS. is bound to use ordinary care in supplying and maintaining proper instrumentalities for the performance of the work required, and generally to provide for the safety of the servant in the course of the employment to the best of his skill and judgment. And if he fail in the performance of his duty in this particular, he is as liable to the servant as he would be to a stranger. *Hough v. Railroad Co.*, 100 U. S. 213; *Wabash R. Co. v. McDaniels*, 107 Id. 454; s. c., 11 Am. & Eng. R. R. Cas. 158; 2 Thompson on Negligence, 985-6, sec. 5.

And where injuries are caused by the negligence of a servant who is charged with the performance of duties which by law it is incumbent on the master to perform, such servant is regarded as the representative of the master, and in legal contemplation his negligence is the negligence of the master.

Judge Cooley states the rule thus: The master "is not responsible to one person in his employ for an injury occasioned by the negligence of another in the same service, unless generally or in respect of the particular duty then resting upon the negligent employee, the latter so far occupied the position of his principal as to render the principal chargeable for his negligence as for personal fault." Cooley on Torts, 564.

In *Lewis v. St. L. & I. M. R. Co.*, 59 Mo. 495, it was held that where the servant of a railroad corporation is injured by defects in the machinery or track of the company, the latter cannot defend on the plea that such defects resulted from the negligence of fellow-servants.

That was an action to recover damages for injuries sustained by a brakeman in consequence of an excavation alongside the defendant's track; and in the course of its opinion the court said: "It was the duty of the section foreman to keep the track in repair, and see that everything was right. He was notified of the existence of the hole, and complaint was made to him about it, but he negligently omitted to act and failed to remedy the defect. Notice to him was notice to the company, and his negligence was the company's negligence."

In the recent case of *Chicago, Milwaukee & St. Paul R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501, it was decided by the Supreme Court of the United States that the defendant company was liable to the plaintiff, who was a brakeman in its employ, for injuries resulting from the negligence of the conductor of a freight train upon which the plaintiff was employed "in no proper sense of the terms," said the court, "is he (the conductor, a fellow-servant with the fireman, the brakemen, the porters and the engineer. The latter are fellow-servants in the running of

the train, under his direction ; as to them and the train, he is in the place of and represents the corporation."

The same doctrine had been previously held by this court in *Moon's Adm'r v. Richmond & Annapolis R. Co.*, 78 Va. 741, 17 Am. & Eng. R. R. Cas. 531. In that case the death of the plaintiff's intestate, who was a brakeman, was caused by the current negligence of the conductor, under whose direction he was, and the agents of the company having in charge the road on the track ; and it was held that the plaintiff was entitled to maintain his action.

In delivering the opinion of the court Judge Fauntleroy said : "Inasmuch as 'the conductor was not a fellow-servant of the plaintiff, but his superior, and in a position wherein he exercised discretionary authority, and was charged with certain duties for the performance of which the law holds the company itself responsible, any negligence on his part in this behalf is the negligence of the company itself.'" And further he said : "Herndon, the station-master . . . could in no sense be regarded a fellow-servant of the plaintiff, as he was not employed under the same common employment or department of service as the plaintiff, Moon, who was a train hand and brakeman. They were not fellow-employees, thrown together in a common duty, and having no opportunity to observe and judge of the habits and qualifications of each other." See also note to the case of *C., M. & St. L. R. Co. v. Ross*, 17 Am. & Eng. R. R. Cas. 501, where the same principle was collected.

Applying these principles to the present case, the first question is, whether the circuit court erred in admitting the evidence of the witness, Copp.

The substance of the witness' statement was, that witness **FACTS AND EVIDENCE.** Copp, was employed as a section hand by the defendant company, he on one occasion remarked to Flynn, then the section boss, that if he did not take out that rock meaning the rock that fell—"there would be a thunderstorm some day," that he did not know whether Flynn heard him or not, but supposed he did, as "the remark was made near enough to him to hear it." The defendant excepted to this statement on the ground that the remark to Flynn was not notice to the company, and further because it was made, as the witness testified, thirteen years before the casualty occurred.

And the second question is, whether the conversation between the witness, Reddy, and Foster, an employee of the company, the evening preceding the day on which the casualty occurred, was competent evidence, as held by the Circuit Court.

It appears that Foster was employed as a night watchman, as such to watch the cut from the side of which the rock fell, that on the occasion referred to, the witness remarked to

the latter was leaving his house for the cut, that he had never seen water running under and around the rock, and that the rock was dangerous; that Foster then started with his horse for the cut, saying to the witness that if the rock was dangerous he would not return, otherwise he would, and that he remained in the cut till next morning about six o'clock. It also appears that the track-walker passed through the cut twice that morning, between six and seven o'clock, examined it on both sides, and found it, in his judgment, in good condition; that three trains of the company passed through the cut that morning, the last about ten or eleven o'clock; and that the collision occurred at that day.

The court is of opinion that neither exception is well taken, and that the evidence was properly admitted to be weighed by the jury. That Flynn and Foster were supervising agents of the company, employed with its authority," the one a section-master, the other a night-watchman, whose duty it was to guard the track at the point where the rock fell. They were charged with the performance of duties which by the laws of the company are incumbent on the company to perform; and

SECTION-MASTER
AND WATCHMEN
HELD TO REPRESENT
COMPANY.

that to that extent, the representatives of the company, notice was given to the company itself. To hold otherwise, would be to hold that a corporation, whose lines, as we know from the evidence in the present case, extend into several States of the Union, and over which numerous employees are daily carried, is, in the guarding of its track, virtually without a representative at all. It would be to declare that to be law, which is inconsistent neither with reason nor sound policy, and the consequences of which it is easy to imagine.

Can this be not the correct view, and if in the present case notice was given to Flynn and Foster, could notice affect it?

NOTICE
CONSIDERED.

Can notice to an executive officer suffice? And if so, to whom? We are at a loss to answer. On the other hand, let it be settled that the humblest watchman who walks the track is within the scope of his employment, the representative of the company, that he has eyes to see, ears to hear, and lips to communicate to his superiors, the knowledge he acquires as to the condition of the track, or of impending danger, and the law upon this important subject will be placed upon such a footing as that no man can misapprehend and all reasonable men must approve

such is the law is clear, we think, not only upon reason but upon the authorities already referred to; from which it will appear, that in cases like the present, the proper inquiry is, not what is the duty of the servant, but does he represent the company? And if

he does, then the result is the same, no matter whether his high or low—whether he be the president of the company, conductor of a train, a section-master, or a common watchman.

The company, then, having received notice of the danger, it thereupon became its duty to take the requisite steps to avert it, and having negligently failed to do so, it is answerable for the consequences.

The next question relates to the instructions which were given to the jury at the instance of the plaintiff. The instructions are as follows:

"I. The court instructs the jury that the plaintiff, McKenzie, is presumed to have exercised due and proper care at the time of the wreck at which he was injured, and the burden of proving he was negligent is upon the defendant.

"II. Even if the jury should believe from the evidence that the plaintiff jumped from the defendant's car at the time of the wreck, yet if they further believe from the evidence that said plaintiff did so under a well-grounded fear of danger to his life, the plaintiff is as much entitled to recover in this action, so that jumping is concerned, as if he had received the injuries complained of while in defendant's car, although they may further believe from the evidence that if he had remained in the car he would have been injured.

"III. Even though the jury may believe from the evidence that the plaintiff received the injuries complained of by him by jumping from the defendant's car at the time of the wreck, yet if the jury further believe from the evidence that the plaintiff was so stunned and bewildered by the shock of the collision that he was rendered said plaintiff unconscious of what he was doing, then the jury are instructed that said jumping was not such negligence as to prevent plaintiff from recovering damages any more than if he had received said injuries complained of while in defendant's car, and the jury may further believe from the evidence that no injuries had been received by him if he had remained in said car.

"IV. If the defendant claims exemption from liability on the ground that the plaintiff because of plaintiff's standing in the relation of a servant, then, in order to exempt the said defendant from such liability, the said defendant must not have been guilty of negligence, and the first instruction for defendant as given by the court, and the burden of such negligence is on the plaintiff."

We are of opinion that these instructions correctly propound the law applicable to the case, and were properly given.

The plaintiff, McKenzie, relied on the defence of contributory negligence, it was incumbent on it to prove it, and in the absence of satisfactory proof to establish such defence, the plaintiff must be presumed to have been without fault. This, indeed, is not disputed. And the second instruction

—SAME HELD
CORRECT—CON-
TRIBUTORY NEG-
LIGENCE MUST
BE PROVED—
PROXIMATE
CAUSE.

instructions are equally unexceptionable. The principle, as declared in numerous cases, is thus stated by Thompson: "If A, through his negligence or fault, puts B in a position of immediate danger, real or apparent, and B, through a sudden impulse of fear, makes a movement to escape the danger, and in so doing accidentally receives another and different injury from that threatened by the negligence of A, he may recover damages of A; for A's negligence or fault is the proximate cause of his injury. Thus, a coach suddenly breaks down, going at a moderate gait on a level road. A passenger seated upon the top, becoming alarmed, leaps to the ground, and thereby sustains an injury. If he had remained seated he would not have been injured. The breaking of the coach is the proximate cause of the injury, and if this happened through the negligence of the proprietor, he must pay damages; otherwise not." And in a foot-note the author adds: "It is upon like ground that the criminal law excuses homicide, when committed under a supposed necessity of self-defence, in the presence of words and demonstrations which threaten death or great bodily harm, although in fact no harm is intended." 2 Thompson on Negligence, page 1092, sec. 8.

The same principle is laid down in Sherman and Redfield on Negligence, sec. 28, as follows: "The plaintiff's right to recover is not affected by his having contributed to his injury, unless he was in fault in so doing. It is possible for the plaintiff not only to contribute to, but even to be himself the immediate cause of his own injury, and yet to recover compensation therefor. If his share in the transaction was innocent, and not incautious, it furnishes no excuse for the defendant. Thus, where by the negligence of a railroad company the train was run into such danger that in order to escape from greater peril the plaintiff jumped off and thus injured himself, he recovered damages against the company." See also *Stokes v. Saltonstall*, 13 Pet. 181.

This statement of the law was cited with approbation by this court in *R. & D. R. Co. v. Morris*, 31 Gratt. 200, which was an action by a passenger against the company; but we apprehend the principle equally applies to a case like the present.

The fourth instruction, taken in connection with the first that was given for the defendant, is in accordance with the views already expressed in this opinion, and is entirely right.

At the trial, the defendant moved the court to instruct the jury, among other things, as follows: "Servants are engaged in a common employment when each of them is occupied in service of such a kind as that all of them in the exercise of ordinary sagacity ought to be able to foresee when accepting their employment that it may probably expose them to the risk of injury, in case any one of such

INSTRUCTIONS AS
TO CO-SERVANTS.

servants is negligent. Thus, among others, an expressman on a master's trains and engaged in his business (thereon same common employment with the engineman, fireman, baggage-master, and other inferior servants do master's business on such trains under the control of the conductor of the train."

This instruction, however, the court refused to give in its original form, but modified it, and as modified and given, it reads as follows: "The business of the defendant is one of great risk, and is presumed to enter into the master's service with full knowledge of all the ordinary risks and hazards incident to the business; and among such risks and hazards are those arising from the negligence of his fellow-servants engaged in the same department, and acting under the same immediate direction. The hazardous character of the business itself, the liability of the track to be unexpectedly obstructed by land-slides and rock-slides, natural causes, the liability of cuts and the rocks therein to fall in the course of years and under exposure to the weather, grass to grow and disintegrate and unexpectedly to slide down upon the track, and the damages can be recovered by any servant against the master for injuries from such causes, except where the injury results from the fault or negligence of the master himself, or some agent acting for him in the matter. But if the jury believe from the evidence that the plaintiff was not in the department of the defendant in which the defendant's vice having in charge the care of the track and cuts of the defendant's railway, and that prior to the fall of the rock on the evening and night previous, resulting in the wreck of the train and injury to the plaintiff, the appearance of the rock on the ground, earth and rocks at and about it, and the kind of weather, was such as to create a reasonable apprehension of its falling or sliding upon the track, and that the attention of an employee or employee of the defendant, when engaged in the care of said track at the time said rock was called to said rock, they are instructed to find that the knowledge of the employee of any such dangerous indication of the sliding upon the track of said rock was the knowledge of the defendant, through its employee or employees representing the defendant, imposed upon the defendant the duty of providing against such dangerous indications by removing said rock or securing it in its place in the bank, or, if the defendant in any other way failed to remove said dangerous indication, or might have known thereof by the exercise of reasonable care and diligence, the failure to remove said rock was negligence."

Objection is made to the modified instruction, on the ground that the question of negligence was not left to the jury, but was decided by the court itself. We think so. The jury were instructed that if they believed

NEGLIGENCE
HELD LEFT TO
JURY.

that the plaintiff was not in the department of the de-
 s service having in charge the care of its track and the cuts
 line; that on the evening previous to the fall of the rock, its
 ce and immediate surroundings and the weather were such
 ate a reasonable apprehension of its falling or sliding upon
 t, and that the attention of an employee of the defendant
 n charge the care of the track at that point was called to
 erous condition of the rock, then that the knowledge of
 oloyee was the knowledge of the defendant, and imposed
 he duty of providing against the threatened danger by re-
 ce the rock or securing it in its place; and that the failure to
 e negligence, the same as if the defendant knew of the con-
 the rock in any other way, or might have known thereof
 e of reasonable care and diligence.

It is to be observed that the question of negligence is a
 question of law and fact. "It includes two NATURE OF QUESTION OF NEGLIGENCE.
 : 1. Whether a particular act has been per-
 or omitted; and 2. Whether the performance or omission
 et was the breach of a legal duty. The first of these is a
 question of fact, the second is a pure question of law." Sher-
 Redfield on Negligence, sec. 11. Therefore the circuit
 properly instructed the jury, in effect, that if the evidence
 at on the evening previous to the falling of the rock, the
 t knew, or if at any time prior thereto by the use of
 e diligence it might have known, that the rock was
 s, then, that the measure and standard of its duty was
 defined by law, and that the defendant's failure to secure
 e the rock was the breach of a legal duty, or, in other
 egligence, for which it was liable. See also 2 Thompson
 egligence, p. 1236, sec. 11; Railroad Co. v. Stout, 17 Wall.

That is here said must be taken in connection with the in-
 almost immediately following, which is as follows: "The
 further instructed, that, although they may believe from
 nce, that the rock or rocks had been imbedded in the side
 t, and fell on the track after the passage through said cut
 trains during the morning of the 6th of February, 1884,
 id trains having passed through between ten and eleven
 and between two and three hours before said rock was
 said engine on said track,—such fact, of itself, will not
 e plaintiff, though injured by the collision of the engine
 with said rock, to recover damages in this action, and he
 eover such damages unless the jury believe from the evi-
 at such rock gave indications of falling, to which the at-
 f the defendant's employee or employees to said indica-
 falling was called in time for its removal or securing it,

and that said rock fell by reason of the negligence of the servant in not securing or removing said rock."

The court also refused to give the third instruction asked for by the defendant, which asserts the same doctrine contained in that of the first instruction which we have seen was rejected, but with rather more emphasis, namely, that the plaintiff being a servant of the engineer of the train, could not recover if the injury was caused by the negligence of the engineer alone.

We are of opinion that this instruction was properly refused. At the same time, it may, perhaps, be conceded, in the absence of satisfactory evidence to vary the case, that where a railroad company, as is the case here, does its own express business, and accepts service with the company as an express messenger,

EXPRESS MESSENGER AND ENGINEER ARE CO-SERVANTS. considered as a fellow-servant of the engineer and of the subordinate employees engaged in operating the trains of the company on which he is carried while performing his duty as such express messenger; and this, notwithstanding its express department is a distinct department of the company's business. For they are employed and paid by the same employer. Their duties bring them together at the same place, that is, on the same trains, and at the same time. They are under the direction of the same conductors, who control the movements of the trains; and hence it may fairly be said that when an express messenger enters the service, he can easily foresee, and therefore "takes upon himself the natural and ordinary risks and perils incident to the performance of such service," including the perils arising from the negligence of those engaged in operating the trains, and that his "compensation is adjusted accordingly." *Farwell v. Boston, etc., R. Co., supra*; *Clark's Adm'r v. R.R. Co. & Danville R. Co.*, 78 Va. 709; s. c., 18 Am. & Eng. R.R. Rep. 201.

In *McAndrews v. Burns*, 39 N. J. Law, 117, Dalrimple defined the relation comprehended by the term fellow-servant as follows: "A fellow-servant I take to be any one who is employed by the same master. Common employment is service of such a kind that, in the exercise of ordinary sagacity, all who engage in it are able to foresee, when accepting it, that through the negligence of fellow-servants it may probably expose them to injury." The ground on which rests the exemption of the master from liability to the servant for negligence of a fellow-servant engaged in common employment is, that the servant is presumed to contract with reference to the risk incurred." But the rule of exemption does not apply, as we have seen, where the injury is caused by the negligence of an agent whose position is that, not of a fellow-servant, but of a representative of the employers, or vice-principal.

And it has been held in respect to railway service, that it is necessary that the servant injured, in order to exempt the

bility within the rule, should have been engaged in the run-
 erations of the road. Thus, in *Morgan v. Vale of Neath*
 5 Best & S. 570 (117 Eng. C. L. 568, 723), Blackburn,
 "There are many cases where the immediate object on
 one servant is employed is very dissimilar from that on
 the other is employed, and yet the risk of injury from the
 ce of the one is so much a natural and necessary conse-
 of the employment which the other accepts, that it must be
 in the risks which are to be considered in his wages. I
 at whenever the employment is such as necessarily to bring
 on accepting it into contact with the traffic of the line of
 risk of injury from the carelessness of those managing that
 one of the risks necessarily and naturally incident to such
 oyment, and within the rule."

was an action by a carpenter, in the employment of the
 y, to recover for injuries caused by the negligence of those
 in turning a locomotive on a turn-table, near to which the
 was at work; and it was held by the Court of Queen's
 nd affirmed in the Exch. Chamber, that he was not en-
 recover.

nceding all this, the fact remains that the question whether
 tiff in the present case and the engineer of the train were
 vants, within the rule, is a mixed question of law and fact;
 question to be determined by the jury on the facts, under
 instructions from the court as to the law; and here the
 s asked, in effect, to tell the jury, as a matter of law, that
 tion existed, which it very properly refused to do. *Mullan*
etc. Steamship Co., 78 Penn. St. 25; *Potter v. Chicago,*
Co., 46 Iowa, 399.

efendant also moved the court to instruct the jury, that
 ould believe from the evidence that the engine and train
 good condition, and under the control and
 of competent and reliable persons; "that it
 he judgment and opinion of expert railroad
 engineers with that engine and train on those grades, im-
 le to have avoided the collision, etc., then they must find,"
 is the court modified, so as to read: "And that it was in
 ment and opinion of *all* the expert railroad men and en-
examined as witnesses in the cause, that with that engine
on those grades," etc.; the words italicized being added;
 modified, the instruction was given.

is the defendant complains; and it is true that in modi-
 e instruction, the meaning of the court is not as fully and
 expressed as it might have been. But it cannot fairly
 ve think, that the jury were misled. On the contrary, the
 dently intended to say to the jury, and the jury must have

INSTRUCTION A
 TO WEIGHINGS
 TESTIMONY.

understood the court to mean, that in considering the question of negligence in the management of the train, they must weigh all the expert testimony in the case, as well that for the plaintiff as for the defendant, and decide in accordance with the preponderance of the evidence. And so construed, the instruction is unexceptionable. But independent of this instruction, the verdict could not properly have been otherwise than for the plaintiff, and the defendant, therefore, in any view, has not been prejudiced. *Danville Bank v. Waddill*, 27 Gratt. 448; *Snouffer's Adm'r v. Hansbrough*, 79 Va. 166; *Chicago, etc., R. Co. v. Ross*, *supra*.

The defendant also complains of the modification which was made by the court of its twelfth instruction. The court was asked to instruct the jury to "be on their guard against feelings of sympathy, compassion, and charity, and against making any extravagant allowance." The modification consists in adding, immediately after the word "allowance," the words "growing out of said sympathy, compassion, and charity;" so that, by the modified instruction, the jury were cautioned "against feelings of sympathy, compassion, and charity, and against making any extravagant allowance growing out of said sympathy," etc.

The complaint is that the court, by adding these words, turned aside the instruction from its true intent and object, and left the jury to infer that, while guarding against feelings of sympathy, compassion, and charity, they were free to make an extravagant allowance from passion, prejudice, or any other impulse or feeling. We do not think the instruction is justly obnoxious to such a criticism. Surely telling the jury to guard against feelings of sympathy, compassion, and charity could not be construed by any intelligent and right-minded juror as an invitation or license from the court to violate his oath as a juror, and give way to passion, prejudice, or any other improper feeling. To tell a jury not to be swayed by passion or prejudice, is only mildly to instruct them not to violate their solemn oaths, an instruction, let us hope, unnecessary in the administration of justice in the courts of this commonwealth.

This sufficiently disposes of all the questions arising in the case. No exception was taken to the refusal of the circuit court to set aside the verdict and to grant a new trial. And, upon the whole, we are of opinion that there is no error in the record to the defendant's prejudice. The judgment must therefore be affirmed.

Judgement affirmed.

Master's Exemption from Liability for Servants' Torts to Fellow-Servants.—See note to case of *Missouri Pac. R. Co. v. Mackey*, 22 Am. & Eng. R. R. Cas. 820.

NORTHERN PACIFIC R. Co.

v.

HERBERT.

(*Advances Case, U. S. Supreme Court. February 1, 1886.*)

If a challenge be for cause, its allowance cannot be held to prejudice a party, if a competent and unbiassed juror was afterwards selected, and a fair trial had.

The exaction of a remission of a portion of the verdict, as a condition for refusing a new trial, is a matter within the discretion of the trial court.

Section 1180 of the Dakota Code does not change the law previously existing as to the exemption of an employer from responsibility for injuries committed by a servant to a fellow-servant in the same general business, or identify the business of providing safe machinery and keeping it in repair with the business of handling and removing it.

Section 1181 of the Dakota Code expresses the general law that an employer is responsible for injuries to his employees caused by his own want of ordinary care.

The selection by an employer of defective machinery, which is to be moved by steam-power, is of itself evidence of a want of ordinary care; and allowing it to remain out of repair when its condition is brought to his notice, or by proper inspection might be known, is culpable negligence.

A brakeman having been employed but one day in a railroad yard, when, in consequence of a defective brake, he received the injury for which suit was brought, he cannot be charged with contributory negligence if the defect was not patent to the eye, or if he was not informed of it by others. He had a right, in the absence of such information, to assume that the brakes were in a condition in which it was safe to mount the cars and set them when ordered by the yardmaster.

Blatchford, Bradley, Matthews and Gray, JJ., dissenting.

IN error to the Supreme Court of the Territory of Dakota.

W. P. Clough and *George Gray* for plaintiff in error.

Thomas Wilson for defendant in error.

FIELD, J.—The Northern Pacific R. Co. is a corporation created under the laws of Congress to construct a railroad and a telegraph line from Lake Superior to Puget Sound. In 1879 it had constructed and was operating the road from Duluth, in Minnesota, to Bismarck, in Dakota. On the twenty-fourth of October of that year the plaintiff in the court below, the defendant in error here, was a brakeman in its yard at Bismarck, where its cars were switched upon different tracks and its trains were made up for the road. It was his duty, among other things, to set and to loosen

the brakes of the cars whenever necessary, and whenever ordered FACTS. to do so by the yard-master. At the time mentioned he was ordered to stop, with the brakes, two cars which had been switched upon a track in the yard. In obedience to this order he went upon the rear car and attempted to set the brake attached to it, but the brake was so badly broken and out of order that it could not be made to work. As soon as he discovered this he stepped on the forward car in order to stop it. The brake on that car was a "step-brake," and in order to work it he was obliged to place his foot on the step attached to the car below the top, and this brought his foot and leg between the two cars. This brake was also out of order, and while attempting to set it, his foot being upon the step, the car struck another car on the track, and was suddenly stopped. The draw-bar and bumper of the rear car had been pulled out, and for want of them the two cars, when the forward one was suddenly stopped, came violently together, crushing his leg, so that amputation became necessary. To recover damages for the injury sustained he brought this action against the company, alleging that it was its duty to provide good and safe cars, and machinery and apparatus of a like character for braking and handling them, and also to make rules and regulations for switching and handling them in the yard, and for notifying employees of the condition of defective and broken cars, so that they might not be subjected to unnecessary danger; but that it neglected its duty in these particulars, and thereby, without his fault, he was injured as stated.

In its answer the company admitted the allegations as to the employment of the plaintiff, and the injuries he had received, but set up that it was his duty to know, and that he did know, the condition of each of the cars, and that he carelessly put his leg between them when setting the brake of the forward car, and thus, through his own fault, suffered the injury of which he complains.

There was a verdict in favor of the plaintiff for \$25,000. A motion for a new trial was made on various grounds; among others, that the damages were excessive. The court ordered that a new trial be granted unless he remitted \$15,000 of the verdict, and in case he did so that the motion be denied. He remitted the amount, and judgment was entered in his favor for the balance, and costs of suit, which the supreme court of the Territory affirmed.

For the reversal of the judgment several errors of the court below are assigned; but, so far as they are deemed material, they may be reduced to four: (1) In sustaining a challenge to a juror; (2) in denying a new trial on condition that the plaintiff should remit a part of the sum awarded by the verdict; (3) in refusing to dismiss the suit at the close of the plaintiff's case; (4) in refusing

to charge that the plaintiff should have taken notice of the defects in the cars, and that he was guilty of such negligence in that respect as to deprive him of a right to recover.

1. As to the challenge to a juror. It appears that one Weaver, summoned as a juror, testified that he was a lumber dealer, and that the company gave him a place on its right of way for a lumberyard, without rent, and also that he had heard the accident to the plaintiff spoken of and explained. It was not shown, however, that he had any actual bias for or against either party, or any belief or opinion touching the merits of the case. He was, nevertheless, challenged, and the allowance of the challenge constitutes the first error assigned. It does not appear whether the challenge was for cause or was peremptory. Under the statute of Dakota each party is entitled to three peremptory challenges. It is for the party asserting error to show it; it will not be assumed. But if we regard the challenge as for cause, its allowance did not prejudice the company. A competent and unbiassed juror was selected and sworn, and the company had, therefore, a trial by an impartial jury, which was all it could command. *U. S. v. Cornell*, 2 Mason, 104; *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 279; *Atchison, T. & S. F. R. Co. v. Franklin*, 23 Kan. 74; *Carpenter v. Dame*, 10 Ind. 130; *Morrison v. Lovejoy*, 6 Minn. 349, 350 (Gil. 224).

CHALLENGE TO
JUROR.

2. The exaction, as a condition of refusing a new trial, that the plaintiff should remit a portion of the amount awarded by the verdict was a matter within the discretion of the court. It held that the amount found was excessive, but that no error had been committed on the trial. In requiring the remission of what was deemed excessive it did nothing more than require the relinquishment of so much of the damages as, in its opinion, the jury had improperly awarded. The corrected verdict could, therefore, be properly allowed to stand. *Hayden v. Florence Sewing-Machine Co.*, 54 N. Y. 221, 225; *Doyle v. Dixon*, 97 Mass. 208, 213; *Blunt v. Little*, 3 Mason, 102, 107.

REMISSION OF
DAMAGES.

3. The dismissal of the suit at the close of the plaintiff's case was moved on the ground that the plaintiff had failed to establish a cause of action; and in support of this position it is contended that the plaintiff was a fellow-servant of the officer or agent of the company who was charged with the duty of keeping the cars in order, and therefore could not recover against the company for injuries suffered by reason of the latter's negligence, and that this exemption from liability is declared by the statute of Dakota. The general doctrine as to the exemption of an employer from liability for injuries to a servant caused by the negligence of a fellow-servant, in a common employment, is well settled. When several persons are

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thus employed there is necessarily incident to the service the risk that the others may fail in that care and vigilance are essential to his safety. In undertaking the service he takes that risk, and, if he should suffer, he cannot recover from his employer. He is supposed to have taken it into consideration when he arranged for his compensation. As we said on a former occasion: "He cannot, in reason, complain if he suffers from the risk which he has voluntarily assumed, and for the assumption of which he is paid." *Chicago & M. R. Co. v. Ross*, 112 U. S. 338, 17 Am. & Eng. R. R. Cas. 501.

It is equally well settled, however, that it is the duty of the employer to select and retain servants who are fitted and competent for the service, and to furnish sufficient and safe machinery, or other means by which it is to be performed, and to keep them in repair and order. This duty he cannot delegate to another servant so as to exempt himself from liability for injuries caused by another servant by its omission. Indeed, no duty required of the employer for the safety and protection of his servants can be transferred to the servant as to exonerate him from such liability. The servant does not undertake to incur the risks arising from the want of sufficient machinery, or from defective machinery or other instruments with which he is to work. His contract implies that in regard to these matters his employer will make adequate provision so that no danger shall ensue to him. This doctrine has been frequently asserted by courts of the highest character that it is not to be considered as any longer open to serious question.

It was substantially declared in the recent case of *Hough v. Hough*, 100 U. S. 213, where we said that notwithstanding the fact that a road corporation may be controlled by competent, watchful and prudent directors, and care and caution are exercised in the selection of subordinates at the head of the several branches of the service, its obligation still remains to provide and maintain in good and safe condition the machinery and apparatus to be used by its employees; and that it "cannot, in respect to such matters, shift the responsibility between it and the servant, who has been injured without fault on his part, the personal responsibility of an agent, who, in exercising his duties, has master's authority, has violated the duty he owes as well to the corporation as to the servant." In that case the engine of a road, coming in contact with an animal, was thrown from the track over an embankment, whereby the whistle fastened to the engine was forced out, thus permitting hot water and steam to escape, which so scalded the engineer as to cause his death. The engine was thrown from the track because the cow-catcher or pilot was defective, and the whistle was forced out because it was insecurely fastened. These defects were owing to the negligence of the company's master-mechanic and the foreman of the round-

as committed the exclusive management of the motive power to the company, with control over all the engineers employed. In an action by the widow and child of the deceased, the company set up as a defence that if the alleged defects existed, they were owing to the negligence of those servants, which the company was not liable. The court held that the company was not thereby exonerated from liability.

In *Ke v. Boston & A. R. Co.*, 53 N. Y. 549, it was held by the court of appeals of New York that a corporation is liable to an action for negligence or want of proper care in respect of such duties as it was required to perform as master or principal, in regard to the rank or title of the agent intrusted with their performance; and that as to such acts the agent occupies the place of the corporation; and that the latter is deemed to be present, and is jointly liable for the manner in which they are performed. It appeared that the accident, which caused the injury complained of, was in consequence of an insufficient number of brakemen on the cars of the company. The fact that the company had in whose business it was to make up the trains, to hire and employ brakemen, and to prepare and dispatch the trains, did not exonerate it from liability.

In *Coran v. Holbrook*, 59 N. Y. 517, it appeared that the defendant operated a cotton-mill, to the management of which they gave their personal attention, but intrusted it to a general agent with full power. In the mill was an elevator used by the employees, which came out of repair and unsafe, of which the agent had notice. He neglected to have it repaired, and an employee was injured in its fall. The court held that the defendants were liable; that the general agent was not a mere fellow-servant, but occupied the place of the owners; and that they could not, by delegating authority to another and absenting themselves, escape from liability for the non-performance of duties they owed to their employees.

"As to acts," said the court, "which a master or principal is bound as such to perform towards his employees, if he delegates the performance of them to an agent, the agent occupies the place of the master, and the latter is deemed present and liable for the manner in which they are performed."

In *Miller v. Jewett*, 80 N. Y. 46, an engineer on the Erie R. Co. was killed by the explosion of the boiler of a locomotive, caused by its defective condition. To the action brought by his administrator it was contended that the negligence of the mechanics in repairing the boiler in a safe condition was the negligence of his employees in the service of the company, for which it was not liable. But the court affirmed the principle of the decisions cited, and held that an act or duty which the master, as employer, is bound to perform for the safety and protection of his em-

ployees cannot be delegated so as to relieve him from liability to a servant injured by its omission or its negligent performance, whether the non-feasance or misfeasance be that of a superior or inferior officer, agent, or servant to whom the doing of the act or the performance of the duty has been committed. "In either case, in respect to such act or duty," said the court, "the servant who undertakes or omits to perform it is the representative of the master and not a mere co-servant with the one who sustains the injury." *Pantzar v. Tilly Foster Iron Min. Co.*, 99 N. Y. 368, (decided the present year by that court), is to the same effect.

In *Ford v. Fitchburg R. Co.*, 110 Mass. 241, which was a similar action for injuries caused by the explosion of an engine boiler out of repair, the same defence was made, that the want of repair was owing to the negligence of a fellow-servant in the department of repairs; but the court said that "the agents who are charged with the duty of supplying safe machinery are not, in the true sense of the rule relied on, to be regarded as fellow-servants of those who are engaged in operating it. They are charged with a master's duty to his servant. They are employed in distinct and independent departments of service, and there is no difficulty in distinguishing them, even when the same person renders service by turns in each, as the convenience of the employer may require. In one the master cannot escape the consequence of the agent's negligence; if the servant is injured in the other, he may." And the court held that there was no error in a refusal to instruct the jury that the corporation was not liable unless the plaintiff proved that the president, directors, or superintendent either personally knew, or by the exercise of reasonable care in the performance of their duties might have known, of the existence of the defect in the engine which caused the explosion; or that the persons employed to have charge of the engine and keep it in repair were incompetent; observing that "the question was not whether the officers named knew, or might have known, of the defect or of the incompetency of those who had charge of the repairs, but whether the corporation in any part of its organization, by any of its agents, or for want of agents, failed to exercise due care to prevent injury to the plaintiff from defects in the instrument furnished for his use."

In *Shanny v. Androscoggin Mills*, 66 Me. 420, the action was by an employee of the defendants for injuries to her hand caused by insufficient and defective covering to machinery and gearing, which she was employed to clean. On the trial the defendants contended, among other things, that if the defective covering was owing to the negligence of a fellow-servant whose duty it was to repair it, they were not liable. But the court said "that the person whose duty it was to keep the machinery in order, so far as that duty goes, was not, in any legal sense, the fellow-servant of

the plaintiff. To provide machinery and keep it in repair, and to use it for the purpose for which it was intended, are very distinct matters. They are not employments in the same common business, tending to the same common result. The one can properly be said to begin only when the other ends. The two persons may, indeed, work under the same master and receive their pay from the same source; but this is not sufficient. They must be at the time engaged in a common purpose or employed in the same general business. We do not now refer to the different grades of services, about which there is considerable conflict of opinion, but of the different employment. In the repair of the machinery the servant represented the master in the performance of his part of the contract, and therefore, in the language of the instructions, his negligence in that respect is the 'omission of the employer in contemplation of law.'"

Numerous decisions from other courts to the same purport might be added. *Bessex v. Chicago & N. W. R. Co.*, 45 Wis. 477, 481; *Wedgwood v. Chicago & N. W. R. Co.*, 41 Wis. 478; *Toledo R. Co. v. Conroy*, 68 Ill. 561; *Drymala v. Thompson*, 26 Minn. 40. The doctrine laid down in them is specially applicable when the employer is a common carrier of passengers and property, and steam is the motive power, inasmuch as any defect in the machinery may be followed by serious disasters. The same considerations which render him responsible in such cases for the safe transportation of passengers and property should also impose upon him an equal responsibility to his employees, so far as their safety depends upon the character and condition of the machinery and appliances used in the transportation. Where the employee is not guilty of contributory negligence, no irresponsibility should be admitted for an injury to him caused by the defective condition of the machinery and instruments with which he is required to work, except it could not have been known nor guarded against by proper care and vigilance on the part of his employer.

According to the authorities cited there can be no question as to the liability of the railroad company to the plaintiff for the injuries he sustained. If no one was appointed by the company to look after the condition of the cars, and see that the machinery and appliances used to move and to stop them were kept in repair and in good working order, its liability for the injuries would not be the subject of contention. Its negligence in that case would have been in the highest degree culpable. If, however, one was appointed by it charged with that duty, and the injuries resulted from his negligence in its performance, the company is liable. He was, so far as that duty is concerned, the representative of the company. His negligence was its negligence, and imposed a lia-

bility upon it, unless, as contended, it was relieved there by the statute of Dakota.

Section 1130 of the Civil Code of that Territory is in the following words:

"CO-EMPLOYEES. An employer is not bound to indemnify an employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another employee by the same employer in the same general business, unless he has neglected to use ordinary care in the selection of a culpable employee."

The next section, 1131, is as follows:

"EMPLOYER'S NEGLIGENCE. An employer must, in case of injury, indemnify his employee for losses caused by the former's negligence or ordinary care."

We do not consider that the first of these sections changes the law previously existing as to the exemption of an employer from responsibility for injuries committed by a servant to a fellow-servant in the same general business, or in the same department of business of providing safe machinery and keeping it in repair with the business of handling and moving freight. The two kinds of business are as distinct as the making and running of a carriage is from the running of it. They are, as in the case decided by the supreme court of Massachusetts, which we have cited above, separate and independent departments of service, though the same person may, by turns, render service in each. The person engaged in the former represents the employer, and in that business is not a fellow-servant with one engaged in the latter. The words "same general business" in the section refer to the general business of the department of service in which the employee is engaged, and do not embrace business of every kind which may have some relation to the affairs of the employer, or even be necessary for their successful management. If any other construction were adopted, there would, under the law, be no such thing as separate departments of service in the business of railroad companies; for whatever would tend to the transportation of persons and property would come under the designation of its general business. The same section is found in the Civil Code of California, and our construction of it accords with that of the supreme court of the State. In *Beeson v. Greentain Gold Min. Co.*, 57 Cal. 20, the defendant, a corporation, was engaged in quartz mining, appointed a superintendent to manage and manage its mining operations, with authority to em-

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charge laborers at the mine. One of the laborers thus engaged his life in a fire, which originated from a defective pipe put up a tinner under the supervision of the superintendent, and connected with the engine used to raise ore and take water from the mine. It did not appear that the deceased knew, or had reason to know, of the defect. In an action by his widow for damages in consequence of his death, it was held, against the contention of the company, that the superintendent was not a fellow-employee of the deceased in the sense intended by the section; that, for the purposes of managing the business and determining what machinery could be used and how placed, he was the representative of the company, and that the deceased was not bound to know whether a defect existed in the machinery and appliances not within his view, but had a right to rely upon the implied engagement of the company that the pipe was properly placed and constructed. It was held that the tinner, in performing his share of the work, was a fellow-servant of the deceased; that as his work was done under the direction and supervision of the superintendent, it was the same as if done by the superintendent in person.

We do not perceive that the provision of the sixth section of the Civil Code of Dakota, that in the Territory "there is no common law in any case where the law is declared by the Codes," at all affects the question before us. There cannot be two rules of law on the same subject contradicting each other; therefore where the Code declares the law there can be no occasion to look further; — SAME HELD IRRELEVANT. where the Code is silent the common law prevails. That constitutes the "same general business" is not defined by the Code, but may be explained by adjudged cases. The declaration by the Code of a general rule, which is conformable to existing law, does not prevent the courts from looking to those cases for explanation any more than it prevents them from looking into a dictionary for the meaning of words.

Section 1131 of the Dakota Code expresses the general law, as we have stated it to be, that an employer is responsible for injuries to his employees caused by his own want of ordinary care. A selection of defective machinery, which is to be moved by steam-power, is of itself evidence of a want of ordinary care; and leaving it to remain out of repair when its condition is brought to his notice, or by proper inspection might be known, is culpable negligence. Here the cars had been defective for years. The brakes were all worn out, and their condition had been called to the attention of the yard-master, who had control of them while in the yard, and might have been ascertained, upon proper inspection by the officer or agent of the company charged with the duty of keeping them in repair, yet nothing was done to repair either the cars or cars. Under these circumstances it cannot be said that

the company exercised, through its officer or agent charged with that duty, ordinary care to keep the cars and brakes in good condition, and therefore, under the provisions of this section, bound to indemnify the plaintiff.

4. As to the alleged negligence of the plaintiff only, words need be said. Of course he was bound to exercise ordinary care to avoid injuries to himself. If he had known, or might have known, by ordinary attention, the condition of the brakes of the cars when he mounted the cars, and thus exposed himself to danger,—in other words, if he did not use his senses, or generally use theirs to keep from harm,—he cannot complain of the injury which he suffered. He had been employed in the yard one day before the accident occurred, and it does not appear that the defects in the brakes or cars were brought to his notice. There was some evidence that statements as to their defective condition were made in his presence and hearing. He testified that he saw no defect in either of them, and was not apprised of any defect in the brakes was not patent to the eye; it could be discovered only from an attempt to set them, or by information from the yard-master. He had a right, therefore, to assume, without such information, that they were in a condition in which it was safe to mount the cars to set them, when ordered by the yard-master.

It was contended in the court below that the plaintiff might have inferred from the manner in which the cars were set, that there was a defect in them. The manner of their attachment showed nothing as to the condition of the brakes, and the evidence left the question of his negligence to the jury. It is instructed that if, from the unusual appearance of the car upon which he was engaged, as, for instance, its being attached to the next car by chains; or if from any statements of the yard master or carman, he had reason to believe that the car in question was defective, or had been broken,—he was bound to take care not to expose himself to injuries which a broken and defective car might cause, and, further, that if they found from the evidence that the company was guilty of negligence in not providing proper machinery and appliances, in consequence of which negligence the injury was received, still, if he failed to exercise that prudence and caution which prudent men, under similar circumstances, would ordinarily exercise, and he thereby contributed to the injury, he was not entitled to recover.

The verdict of the jury, upon these instructions and the same general purport, negatived any imputation of negligence on his part. We see, therefore, no error on the trial, and the judgment below must be affirmed.

HARLAN, J. (concurring).—I concur in the opinion of the court.

Mr. Justice Field, and will add a few suggestions in support of the conclusion reached by the court. It is contended on behalf of the railroad company, that if it was the primary care in the selection of the employee to whose negligence the plaintiff's injuries are attributed, it is proper to hold the employer liable by section 1130 of the Dakota Code, even if the employee had superior or controlling authority over the employee, and even if the injuries were caused by the defective condition of the appliances and machinery provided by the company through its agents for the use of the employee so injured, it is argued, the words "the same general business," in section 1131, embrace every branch or department of the common business, and no distinction is therein made between different grades or the nature of the particular services rendered by them. Even if that were admitted to be a proper construction of section 1130, standing by itself, the inquiry still remains as to the object of section 1131, which declares that the employer must, in all cases, indemnify his employee for losses caused by the employer's want of ordinary care." The latter section was intended to cover cases not provided for in the preceding section. If one section applies to corporations, the other equally applies to individuals. The two sections must be construed together; and it is manifest that, while the statute establishes a rule that the employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary negligence in the business in which he is employed, nor in consequence of the negligence of another person employed by the same employer, "the same general business," it also, with equal distinctness, declares two exceptions to that rule: (1) Where the employer has neglected to use ordinary care in the selection of an employee whose negligence caused the losses in question; (2) Where the losses were caused by the employer's own want of ordinary care. The latter exception is as explicitly declared as is the former, and cannot be ignored or nullified by construction. The case is more distinctly within section 1131 than one where the company fails to appoint some one to provide and maintain the machinery and appliances safe and suitable for use by its employees, where its agent or employee, appointed to that duty, has failed to exercise ordinary care in its discharge? Such an agent or employee, of necessity, the representative of the corporation, cannot in reference to those matters, what may be permitted to do in reference to other matters connected with its business, "interpose between it and the servant who

CARE IN SELECTION OF EMPLOYEE—DAKOTA CODE.

EMPLOYEE HELD REPRESENTATIVE OF COMPANY.

has been injured, without fault on his part, the personal responsibility of an agent." That is clearly shown in the opinion of the court. Between an agent charged with the performance of the duty to provide and maintain safe and suitable appliances and machinery, and the employees who use them, the relation of master and servants does not exist. The want of ordinary care upon him is in the language of section 1131, and according to the judicial authority, a want of ordinary care upon the corporation itself. This case, therefore, comes within the

BLATCHFORD, J. (dissenting).—Mr. Justice BRADLEY, Justice MATTHEWS, Mr. Justice GRAY, and myself are unable to concur in the judgment of the court in this case.

The Civil Code of Dakota, §§ 6, 2129, provides as follows:

"Sec. 6. In this Territory there is no common law in effect where the law is declared by the Codes."

"Sec. 2129. The rule of the common law that statutes in derogation thereof are to be strictly construed has no application in this Territory. This Code establishes the law of this Territory in relation to the subjects to which it relates; and its provisions are to be liberally construed, with a view to effect its objects and to promote justice."

The rules of the common law are therefore not applicable in Dakota, in any case where the statute law is declared in the Civil Code. DAKOTA CODE ON THE SUBJECT, AND THAT STATUTE LAW IS NOT IN DEROGATION OF COMMON LAW. The statute law is not to be strictly construed strictly, but liberally, with a view to effect its objects and to promote justice. Now, what is the statute law in Dakota on the subject involved in this case? It is found in sections 1129, 1130, and 1131 of the Civil Code, as follows:

"Sec. 1129. An employer must indemnify his employee for all damages as prescribed in the next section, for all that he necessarily suffers or loses in direct consequence of the discharge of his duties or of his obedience to the directions of the employer, even if such directions are unlawful, unless the employee, at the time of obeying such directions, believed them to be unlawful."

"Sec. 1130. An employer is not bound to indemnify his employee for losses suffered by the latter in consequence of the ordinary risks of the business in which he is employed, nor in consequence of the negligence of another person employed by the employer in the same general business, unless he has neglected to exercise ordinary care in the selection of the culpable employee."

"Sec. 1131. An employer must, in all cases, indemnify his employee for losses caused by the former's want of ordinary care."

These provisions are very clear. The language used in section 1130, "another person employed by the same employer in the same general business," indicates that, in the view of

of the Code in question, a co-employee is another person
 ed with the employee, by the same employer, MEANING OF EM-
 PLOYEE. same general business. Therefore, wherever the
 "employee" is used in any one of the three sections it means
 who may be such a co-employee. By section 1129 the
 company is not bound to indemnify Herbert, except as
 ed in section 1130, for what he necessarily expended or
 discharging the duty he did in reference to the freight cars.
 is prescribed in section 1130 is this: The company is not
 to indemnify Herbert for what he so lost in consequence of
 ligence of his co-employees in the same general business,
 he company neglected ordinary care in the selection of such
 oyes. No want of care in such selection is alleged, and
 on is sought to be maintained, and the verdict for the
 f may have been rendered, not on the neglect of the cor-
 n itself to provide and maintain suitable cars, brakes, draw-
 d bumpers, but on the neglect of inferior employees of the
 tion to keep them in repair. This is clearly shown by the
 of the court to instruct the jury, as requested by the defend-
 t the plaintiff could not recover by "reason of any acts of
 nce on the part of any other persons employed by the
 nt in the same general business with the plaintiff," and
 his would include the yard-master and car-repairer;" and
 fact that, on the contrary, it instructed them that "the neg-
 of those intrusted by the corporation with the power and
 procuring or keeping in repair such machinery is, in law,
 legence of the corporation."
 sought to destroy the application of sections 1129 and 1130
 case by invoking the rule set forth in section 1131, that "an
 er must in all cases, indemnify his employee for losses
 by the former's want of ordinary care," and by saying that,
 case, the company did not exercise ordinary care, because the
 oyes of Herbert were guilty of the negligence which
 his injury. But that is the very case provided for by sec-
 1130; and the doctrine of the court comes to this, in Dakota:
 en though a railroad corporation, acting by its board of
 s, exercises ordinary care in the selection of its employees;
 vides adequate and competent machinery, outfit, and ap-
 a, and prescribes proper rules and regulations for their use,
 no knowledge or notice of any defects in them, and no
 tances exist sufficient to charge it with such knowledge or
 —it is guilty of want of ordinary care, within section 1131,
 an employee who is injured by the negligence of his co-
 es, in the same general business, by the mere CO-SERVANT
 RULE IN DAKOTA
 the happening of such injury through such neg-
 although section 1130 distinctly declares that, in such a
 e employer shall not be liable to the injured employee. It

is a rule for the construction of statutory provisions, especially those embraced in the same statute, that all must be construed that all shall have effect, if possible. There is ample scope for application of section 1131 by limiting it to cases not embraced in section 1130. Otherwise no force is given to section 1130. Failure to give proper effect to section 1130 is the more manifest because, with one exception, the only authorities cited in the opinion of the court to sustain its views are cases decided where common law prevails, and not where such statutory provisions as those in Dakota exist,—provisions which declare that the common law is abrogated as to the subject-matter of the controversy in suit. Sections 4, 1969, 1970, and 1971 of the Civil Code of California are the same, respectively, as sections 2129, 1129, 1130, and 1131 of the Civil Code of Dakota. But there is nothing in the case of *Beeson v. Green Mountain Gold Min. Co.*, 57 Cal. 400, cited in the opinion of the majority of the court, which sanctions the view that the yard-master or the car-repairer in the present case was not a person employed "in the same general business with Herbert, within the meaning of such a statute.

Considering the case to be governed by the local statute, we express no opinion upon the question whether the instructions given to the jury accorded with the rules of the common law.

Contributory Negligence—Plaintiff held Guilty.—In the following recently determined cases it was held that the facts showed contributory negligence on the part of the plaintiff:

A brakeman who deliberately gets down on the pilot of an engine upon the track, and runs ahead along the track to turn a switch, while the train is moving at the rate of from four to eight miles an hour, is guilty of contributory negligence, and cannot recover for an injury caused by running on the track and being run over by the engine. *Gibbons v. C. & N. W. Ry. Co.*, 28 N. W. Repr. 644 (Iowa, June, 1885).

Where a conductor in charge of a train ordered a train-hand under step from the cars while in motion, in order to couple cars standing on a side track to the main body of the train, coupling being a part of his duty, the obeying of such order will not prevent a recovery by him from injury if he used all reasonable care and skill in so doing. *Centra v. Debray*, 71 Ga. 406.

Plaintiff held not Guilty.—Defendant's master-mechanic, to whose department the plaintiff was subject, had full power and authority to select, employ, and discharge those that operated in that department. The danger of a piece of timber as directed by the master-mechanic was not apparent to the plaintiff from the position he had taken at the direction of the master-mechanic, and the means used by him at the direction of the master-mechanic were only dangerous because of the raised condition of the defendant's engines, which was unknown to him, but was known, or could have been known, to the master-mechanic. *Held*, that these facts sufficiently negative contributory negligence on the part of the plaintiff. *Douglass v. Texas, etc., R. Co.*, 63 Tex. 241.

The bare fact that a conductor of a railroad train left the cars standing upon the engine, where he received an injury which he would not have incurred had he remained in the cars, is not contributive negligence as

whether he was negligent under the circumstances is a question of the jury. *Somerset, etc., R. Co. v. Galbraith*, 1 Central Repr. 138. Suit by one who was coupling cars, brought against the company for injury to his hand, it was error to charge that the plaintiff could not sue unless it was impossible for him to extricate his hand without interference in the emergency was upon him. The rule is, that he could not rely on ordinary care, he could have avoided the injury. *Savannah, etc., v. Barber*, 71 Ga. 644.

The plaintiff's intestate, was at the time of his death in the service of the company, working on the track as a section hand. A freight train was passing along the road where the section men were working became separated into two cars and a caboose being detached from the train. As the train passed the section hands Myers stepped off the track to let the train pass. When the front section of the train passed he stepped on the track and was struck and killed by the detached cars, which were running at a speed of 100 yards behind the front section of the train, and were not stopped by Myers in time to get off the track before he was struck. The jury gave instructions which told the jury, as a matter of law, that certain negligence constituted negligence. *Held*, erroneous; that it is for the jury to determine from the evidence whether one or both of the parties may have been negligent in their conduct, and not for the court to take the question from them and declare if certain facts exist negligence is established. *Myers v. Chicago & N. W. Ry. Co.* (Illinois, March, 1885), 1 N. E. Repr. 899.

GOTTLIEB

v.

NEW YORK, LAKE ERIE AND WESTERN R. CO.

(*Adance Case, New York. November 24, 1885.*)

Question of contributive negligence here, on the part of a brakeman in coupling cars, is, in general, one of fact for the jury. The obligation of a railroad company toward its employees to furnish safe machinery, etc., extends to cars which it receives from another company under a general agreement for transporting them over its road. It is no defense to inspect cars brought to its road under such an agreement, and to find them if obviously defective, equally with cars which it owns. Negligence on the part of a railroad company, in failing to inspect and remedy defects dangerous to brakemen, in consequence of which a brakeman was crushed in attempting to couple two cars, is sufficient to warrant a verdict for damages in favor of the brakeman.

Appeal from a judgment of the Supreme Court at General Term of the Second Department, affirming a judgment upon a verdict in favor of the plaintiff in an action for damages for a personal injury.

Facts are stated in the opinion.

C. Carr for appellant.

W. Lyon for respondent.

EARL, J.—This action was brought to recover damages for personal injuries received by the plaintiff while in the discharge of his duties, as a brakeman, on the freight train of the defendant.

While trying to couple cars he was crushed between them, receiving serious injuries. Whether he was chargeable with contributory negligence was clearly a question of fact for the jury, and the trial judge did not err in submitting it to them, nor in his charge in reference thereto. The sole questions for our consideration were whether there was any evidence of the defendant's negligence, and whether there were any errors in the trial judge's submission to the jury, and whether there were any errors in the trial judge's charge or refusals to charge of the trial judge in reference thereto.

At the time of this accident, the defendant's road was so arranged that both broad and standard gauge cars could be run upon the same train, and there were both kinds of cars in the train in which the plaintiff was acting as brakeman. The train consisted of two in the night-time while under way, and the two cars which were required to couple were of different gauge, and failing to do so, the coupling the draw-heads passed each other, and the bumper being wide enough to protect his person he received the injuries complained of.

The evidence tends strongly to show that the main purpose of the bumpers at the ends of freight cars is to protect brakemen while in the discharge of their duties between the cars, and that they are not sufficiently wide to protect the body of a brakeman when the cars come together. When the draw-heads meet they furnish no protection. But they are liable to pass each other, and when they do the brakeman who happens to be between the cars is exposed to danger, the only protection against which are the bumpers. When two cars come together which are of different gauge the draw-heads are more apt to pass each other, and hence in trains made up of cars of different gauges it is obviously more important that the bumpers should be well looked to, so that they may afford the protection which they are intended.

In this case the evidence tended strongly to show that the bumper on each of the two cars which the plaintiff was attempting to couple was made of a strip of wood only three inches thick nailed to the car, thus leaving when the cars came together a space of six inches, wholly insufficient for the protection of the brakeman.

The defendant was under obligation to its employees to furnish them with reasonable care and diligence in furnishing them with safe machinery, and suitable implements, cars, and machinery for the discharge of their duties, and upon the assumption that the defendant was responsible for the condition of these cars, as if they were owned by it, there can be but little doubt that the evidence is ample to show that it had failed in its duty to the plaintiff. The defect was an obvious one, easily discoverable by the most careful inspection, and it would seem to be the grossest negligence.

DUTY TO FURNISH SAFE MACHINERY.

s into any train, and especially into a train consisting of different gauge.

These two cars did not belong to the defendant. They belong to other companies and came to it loaded, and it was its duty to turn them over its road to their destination. The cars were in good repair and the defects were in their original construction, they being just as they were originally made. The defendant claims that it was bound to receive and transport these cars on its road, and was under no responsibility for any defects in their construction, and that the plaintiff upon entering into its employment assumed all risks from such defects.

It is not necessary in this case to lay down with precision the rule which governs the responsibility of railroad companies, as to the responsibility of other companies which it is engaged in transporting over its

In *Edwin v. Railroad Co.*, 50 Iowa, 680, it was held that it does not constitute negligence for a railroad company in the ordinary course of business to receive and transport the cars of other roads in the same use which may not be constructed with the most approved machinery; and that the transportation or use of such cars by the defendant is one of the risks which an employee assumes in undertaking such employment. In *Ballou v. Railroad Co.*, 54 Wis. 257, it was held that one railroad company receiving a loaded car from another and running it upon its own road is not bound to repeat the inspection which are proper to be used in the original construction of such cars, but may assume that all parts of the car which appear to be in good condition are so in fact. The judge writing the opinion said: "In a case it would seem, upon principle, that the company so receiving a loaded car from another company is entitled to the benefit of the presumption that such car had been properly constructed of good material, and had passed the inspection of some one of its employees, who has skill in such matters, and that it was reasonably fit for the use to which it was devoted when so received."

In *Niel v. Railroad Co.*, 9 Fed. Rep. 337, it was held "that the defendant was bound that no car, whether its own or a foreign car, was to be used otherwise than reasonably and adequately safe for its employment to handle and to manage in the ordinary conduct of their business; that when a railroad company hauls over its road cars not belonging to it, if an accident occurs from their being not reasonably or adequate under any circumstances for the business for which they are employed, and the accident occurs without the negligence of the employee, the company must respond thereto, and the question in such a case is, Was the car reasonably and adequately safe for the employee in handling the same?"

In *McKin v. Railroad Co.*, 135 Mass. 201; s. c., 15 Am. & Eng. R. R. 96, it was held that the defendant was bound as a common carrier to receive and draw cars brought to it from other roads, but

that its obligation to draw such cars did not extend to such unsafe, and that as to cars so received it simply owed its employees the duty of suitable inspection.

In *Jetter v. Railroad Co.*, 2 Abb. Ct. App. Dec. 458, the defendant car causing the injury belonged to another company, and the court in writing the opinion said: "The party assuming to use it is responsible for its fitness to the use to which it was put. If the brakes were defective, the defendants were legally chargeable with any consequences that resulted from such defect while they were using the car for their own purposes," and that "Railroad companies cannot escape responsibility from any defective cars by borrowing them from one another."

In *Jones v. Railroad Co.*, 28 Hun, 364, affirmed in this court, N. Y. 628, plaintiff's intestate, a brakeman, was attempting to get upon a freight car, and one of the iron rings, which was defective, broke and he fell to the ground and was killed; and it was held that the defendant was liable, although the car belonged to another company. See also *Miller v. N. Y. C. & H. R. R. Co.*, 99 N. Y. 212, decided in this court in June, 1885.

It will thus be seen that the utterances of judges as to the responsibility of one company for the defective cars of another company drawn over its road are not entirely harmonious, and that I think all the authorities hold that the company drawing the cars of another company over its road owes, in reference to such cars, some duty to its employees. It is not bound to inspect such cars if they are known to be defective and unsafe. If it is not bound to make tests to discover secret defects, and if it is responsible for such defects, it is bound to inspect for them just as it would inspect its own cars. It owes to its employees a duty of inspection as master, and is, at least, responsible for the consequences of such defects as would be disclosed or discovered by ordinary inspection. When cars come to it which have visible or discoverable defects by ordinary inspection, it must either take such cars or refuse to take such cars. So much, at least, is due from it to its employees. The employees can no more be required to assume the risks of such defects in foreign cars than in cars belonging to the company. As to such defects, the duty of the company is the same as to all cars drawn over its road. Imposing this responsibility is not an onerous or inconvenient one. It requires before a train starts, and before it passes upon its passage, the same inspection and care as to all the cars in the train.

The defect here complained of was obvious, easily discovered by the most ordinary inspection, and it seems that it could have been easily remedied by simply nailing or fastening additional iron to the ends of the cars, so as to give the bumpers sufficient protection to afford the protection needed and intended.

se rules of law were not violated by the trial judge in his, where applied to the facts of this case. He charged: "In ering these questions you can lay out of view the fact that ars did not belong to the company. I charge you that it was y immaterial, whether this was a hired or borrowed car, or er it belonged to the company or not. If the company it in operation and placed it before its employees for use, hey were held to liability if it was defective, and if you nd it to have been defective." And, upon the request of endant's counsel, he refused to charge: "If the cars be- which the plaintiff was injured were those of another com- han the defendant, it is not chargeable with negligence y were improperly constructed or for any defects in their action. The extent of the defendant's duty was to see that ere in good repair while on its road."

le the charge, as made, may have been erroneous so far aid down a general rule, as applied to this case, where the complained of was plainly visible, and easily discoverable inary inspection without the application of any extraordi- unusual tests, it was sufficiently accurate.

have carefully considered the other points argued by the counsel for the defendant, but do not believe them to taken, and they require no particular attention here. judgment should be affirmed.

concur.

ity of Company for Injury received from Defective Cars received other Company.—*Mackin v. Boston, etc., R. Co.*, 15 Am. & Eng. as. 196; *White v. Fitchburg, etc., R. Co.*, 18 Ib. 140.

ation of Company to furnish Safe Cars, Machinery, etc.—The duty road company toward its employees, in reference to cars received other company, consists not in furnishing proper instrumentalities, making proper inspection by competent inspectors under proper endence and instructions. *Keith v. New Haven, etc., R. Co.* (Mass., 5), 2 East. Repr. 723.

iff received injuries in consequence of being thrown from and run a hand-car, by reason of the breaking of the handle thereof, on which was working as the servant of defendant. The wood of which the was made was unfit for the use to which it was put, and this fact overable from its weight, its color, and its grain. *Held*, that an in- which tells the jury that in order to find for plaintiff they must that the car-handle was defective and unsafe, that this was unknown iff, and could not have been known by ordinary care and caution, known or might have been known to defendant by ordinary care, perly given. *State v. Hannibal, etc., R. Co.*, 82 Mo. 430.

iff, a carpenter engaged in repairing bridges, sued for damages for injuries sustained in the course of his employment, by reason of a e hand-car furnished by the master. There was no distinct evidence endant or its agents at any time knew that the handle of the hand- was defective, but there was evidence tending to show that it was bad timber, and was defective, and that this would have been dis-

covered by the use of reasonable care and foresight; and also to show that the defect was one which would not be discovered by its ordinary use. Plaintiff and his co-laborers were under the immediate charge of the foreman, Ryan. Plaintiff says Ryan gave them orders for everything he wanted done. If the cars wanted fixing he told them to go and do it, and they did not do it unless he ordered them so to do; it was his duty to see that the car was repaired. The original construction and testing of the car was delegated to Goff.

The court instructed the jury that if, at the time of the injury, defendant operated repair or machine shops at Hannibal, under the supervision of a foreman, at which shop the hand-cars used on the road were furnished and repaired; that the handle in question was unsafe, defective, and unfit for use in the car, by reason of being brittle ash, or from brittleness or weakness occasioned by long use and exposure to the weather; that said supervisor, as foreman, knew of said defect, or by ordinary care and diligence might have known thereof; that plaintiff was injured by reason of such defect—then the defendant is liable, if plaintiff was at the time exercising such care, and was unaware of such defect. *Held*, that it was unreasonable to infer from the evidence that a car should be sent to the shops to be handled when in the hands of carpenters; that the only inference from the evidence that such repairs were made by them on the order of Ryan; that the foreman of the shops did not seem to have had any duty to perform, either as to the handles when made, or in looking to the repair; that Goff acted reasonably in the place of defendant in these respects. *Held*, also, that an instruction is erroneous which predicates a right to recover upon the knowledge of an agent upon whom no duty devolves to have such care or to exercise such care. Hence, an instruction cannot be proper which predicates upon the knowledge of the department superintendent of the machinery of a railroad company, or upon his want of care, where a laborer on the road engaged in repairing bridges, was injured by the breaking of an iron handle where it was the duty of the foreman of his gang to report the defect to the superintendent and have the defect remedied. *Covey v. Hannibal R. Co.* (Mo., Nov. 1885), 2 Western Reporter, 767.

Plaintiff was employed by defendant in the work of shifting and coupling up trains. In order to shift the trains it was his duty to join the engine to the car by using a pole about six feet long. The poles used by shiftmen at the time of the accident usually had upon them a handle about eighteen feet long, placed in the middle of the pole, so that a man standing in the middle between the engine and the car could lift the pole from its bearing at the engine stops. There was some evidence that a pole without such a handle was unsafe for use, but the testimony upon this point was conflicting. Plaintiff attempted to do shifting with a pole which had no handle, and to which he was injured. The court *held*, that whether the "pushing" of the car without any handle was a reasonable, safe, and suitable instrument was not a question in the case. The evidence was conflicting in regard to whether the case was one proper for the jury, and the court committed no error in submitting it to them. *Philadelphia, etc., R. Co., v. Keenan*, 103 Pa.

CAMPBELL

v.

PENNSYLVANIA R. Co.

(Advance Case, Pennsylvania. January 4, 1886.)

man was under a car repairing it, a train was run into it, the brake-
 on being unable to stop its momentum, and the repairer was in-
 eld—
 t the injury was due to the negligence of a co-servant, if attribut-
 to the fault of the brakemen.
 t the company would in the absence of evidence showing the con-
 resumed to have provided a proper place in which to repair the
 t the repairer took the risks of working on the car in the place it
 t if the place of doing the work was improper, the fact should
 affirmatively proved.

to the court of common pleas, No. 2, of Allegheny

ell was employed by the Pennsylvania R. Co. to work at
 its yard in Pittsburgh; he went on duty for the first
 Saturday, May 6, 1882; he, up to that time, had never had
 e in working about a railroad, being a steel-worker by
 n Monday evening, May 8, he again went to work; the
 assigned him to repairing cars standing on one of the
 n the course of the performance of this work he had oc-
 go underneath a car to place a nut upon a bolt; a train of
 loaded cars was sent upon a descending grade upon the
 k on which stood the car Campbell was repairing; but a
 kman was in charge of the cars dropped down the grade,
 y unable to control the momentum and stop the train at
 d place, it ran on, striking the cars standing on the track;
 t was an injury to Campbell which necessitated the am-
 of a limb. He then instituted an action against the com-
 damages and was nonsuited.

assignments of error were:

he court below erred in granting the defendant's motion
 lsory nonsuit.

he court below erred in refusing the plaintiff's motion to
 id judgment of compulsory nonsuit."

D. F. Patterson and Brown & Stewart for plaintiff in error.
Hampton & Dalzell for defendant in error.

STERRETT, J.—It clearly appears from the testimony that the immediate cause of the unfortunate accident which befell **NEGLIGENCE.** was the negligence of the brakeman in undertaking to drop in, on the track where plaintiff was with a greater number of cars than he was able to control without assistance. The brakeman and plaintiff were engaged in different branches of the same general service, but in the discharge of their respective duties they were brought in such close proximity to each other that the negligence of the former, in carelessly dropping cars, necessarily endangered the safety of the latter. This was therefore, in the proper sense of the term, fellow-servant **CO-SERVANTS.** of the defendant company; and nothing is better settled than that for an injury caused by a fellow-servant without negligence can be no recovery. But, it is contended, the company was negligent in not providing a safe and suitable place for the plaintiff to work in which plaintiff was engaged, and that his injury resulted therefrom. It is undoubtedly the duty of the employer to provide for his employees with such means and appliances as are suitable for the work in which they are employed, and at the same time to exercise reasonable prudence for their safety. In the absence of proof to the contrary the presumption is that he has discharged his duty in this regard. On the other hand, the employee impliedly assumed such risks arising from his employment, as he knows, or by the exercise of reasonable prudence, ought to know, are incident to such employment. There can be no recovery against the employer for injuries arising from patent risks which the employee knowingly and voluntarily assumed. The testimony conclusively shows that plaintiff was fully cognizant of the danger to which he was exposed, from negligently dropping in cars on the tracks where he was from time to time at work, and the precautions taken to avert such danger. He was as fully aware of such risks as the company itself, and knew that his safety depended on the care that was exercised by his fellow-employees.

But aside from this, plaintiff was not entitled to recover **AFFIRMATIVE PROOF.** proving affirmatively that the company neglected its duty of providing a reasonably safe place in which to do the work he was employed to perform. It is contended by the defendant that this was not done; that assuming plaintiff's testimony to be true, and conceding the correctness of every inference drawn which the jury might have legitimately drawn therefrom, the evidence was insufficient to have warranted them in finding the company defendant was guilty of the negligence complained of, and that plaintiff's injury resulted therefrom. An exam-

testimony has led us to the conclusion that this position is ten, and that there was no error in withdrawing the case from the jury and entering judgment of nonsuit. The verdict is affirmed.

to which Servant assumes Risk of Employment.—Plaintiff sues for damages resulting from the loss of his left eye. He charged that he was in the employ of the company, and in the line of his employment was engaged in striking a chisel with a spike-maul, in the act of cutting the iron in two. That a piece or sliver from the head of the cold-chisel was cut off and put his eye out. He alleged that the spike he was using was the cold-chisel was an improper instrument furnished by the company for that purpose. *Held*, that persons who engage in any employment assume the risks necessary to that employment, and when, aware of the dangers connected with it, they voluntarily use implements which they know or ought to know of the knowledge they possess, might know are not so well adapted to their business as other implements, they cannot recover damages resulting therefrom, which might have been avoided by the use of ordinary care which it is the duty of every one to use. *Houston & R. Co. v. Conard*, 62 Tex. 627.

Man v. Chicago, etc., R. Co. (Minnesota, Nov. 1885), 25 N. W. 100. It was held that whether or not it was the custom or mode of business of the defendant to leave frogs unprotected, so that its employees might be presumed to know that such was the custom or mode of business, and, by continuing in the employment, to have taken on the risk incident to that way of doing it, was in this case, as the court found, a question for the jury.

Ford v. Chicago, etc., R. Co. (Illinois, June. 1885), 2 N. E. Repr. 100. The court say: "We are firmly committed to this principle, that if a person, knowing the hazards of his employment, as the business is conducted, continues therein, without any promise of the master to do any thing less hazardous, the master will not be liable for any injury he may sustain therein, unless, indeed, it may be caused by the will of the master. *Simmons v. Chicago & T. R. Co.*, 11 Bradw. (Ill.) 147; *Terre Haute & I. R. Co.*, 111 Ill. 202; s. c., 17 Am. & Eng. R. R. Rep. 100; *Missouri Furnace Co. v. Abend*, 107 Ill. 44; *Pennsylvania Co. v. Smith*, 111 Ill. 334."

A man of mature age and experience, who has been engaged in the service of fireman on a locomotive 20 times, for three hours at a time, is held to know the danger of the employment. *Leary v. Boston & A. R. Co.*, June, 1885), 2 N. E. Repr. 115.

When a servant assumes the ordinary risks of his employment, and, as a rule, such extraordinary risks as he may knowingly and voluntarily encounter, he does not stand upon the same footing as the master. He is to exercise the matter of care in inspecting and investigating the risks to which he may be exposed. He has a right to presume that the master will exercise due care in that respect, so that when directed by proper authority to perform certain services, or to perform them in a certain place, he will be justified in obeying orders without being chargeable with negligence or with the assumption of the risks of so doing. This presumption, however, subject to the qualification that he must not rashly expose himself to unnecessary and unreasonable risks which he can avoid. *Cook v. St. Paul, etc., R. Co.* (Minn., July, 1885), 2 N. E. Repr. 311.

A man was injured by getting his foot caught in a hole between the ties, the failure of the company to grade and ballast that part of their

side track so as to give it a solid surface. In an action brought for damages for the injury it was *held*, that railroad employees are presumed to be aware and to take the risk of dangers from such conditions arising in the construction of a side track as would be open to observation; they are also expected to use reasonable care in examining their work. *Batterson v. Chicago, etc., R. Co.*, 53 Mich. 125.

See *Morse v. Minneapolis, etc., R. Co.*, 11 Am. & Eng. R. R. Trak. v. Cal. S. R. Co., 11 Id. 192; *Galveston, etc., R. Co. v. Lemmon, etc., R. Co.*, 12 Id. 210; *Foraker v. St. Paul, etc., R. Co.*, 15 Id. 171; *Man v. Michigan Cent. R. Co.*, 17 Id. 521; *Rasmuson v. Chicago, etc., R. Co.*, 18 Id. 54.

BLAIR

v.

GRAND RAPIDS AND INDIANA R. CO.

(*Advance Case, Michigan. February 17, 1886.*)

A., who was not an employee of defendant railroad company, was requested by a watchman to go up the track to a bridge and notify the conductor of an approaching train that there was a broken rail on the track. Being anxious to prevent loss of life, A. did as he was bid, and signalled the train to stop as directed. The conductor stopped his train, but did not stop again, and while the cars were running at about four miles an hour, A. seeing that his signal had not been understood, attempted to get on the track and speak to the conductor, when he was thrown off and injured. It was *held* that the company could not be held guilty of negligence; that A. was himself guilty of gross contributory negligence, and was not entitled to recover for the injuries received.

ERROR to superior court, Grand Rapids.

Birney Hoyt for plaintiff and appellant.

T. J. O'Brien and *J. H. Campbell* for appellee.

SHERWOOD, J.—This is a case made, coming from the superior court of Grand Rapids. It calls for a review of the action of that court in sustaining a demurrer to the plaintiff's declaration and entering final judgment against him. The declaration contains three counts which are quite lengthy. The plaintiff's

FACTS. stated in the first two counts is substantially as follows: That the said defendant before and at the time of the commission of the grievances complained of was conducting and operating a railroad in the State of Michigan, through the township of *Field*, in the county of Kent, through which *Rogue* river flows, which is crossed in two places by defendant's road on bridges, one of which is called "Bridge No. 1," and the other "Bridge

bridges are about a half mile apart, No. 1 being about four feet above the water. That the defendant had in its employ, the day the injury complained of occurred, one George S. [redacted], as a watchman, whose duty was to watch the said bridges on the track between and near the same between trains and give at once to the defendant of any defects in the bridges or and especially to stop locomotives and trains on their approach, and give the necessary signals for that purpose, and thus prevent injuries and accidents to persons and property.

The declaration then avers that the plaintiff, who was not connected with defendant's company in any way, was, on the twenty-first day of August, 1878, requested by the said Powell to go north from bridge No. 1 to bridge No. 2 and stop the construction train which was soon to arrive, and inform the conductor of a broken rail on the road a short distance above bridge No. 1, while he, the plaintiff, went south to stop trains coming from that direction. The plaintiff was instructed as to the signals to make, and told to stop the train at all hazards, as there was imminent danger of the loss of the lives of some thirty men on the train, and great loss of property. Plaintiff, before starting, saw the broken rail, which was about one foot long broken entirely out of the rail and fallen at both ends. Plaintiff was only twenty-one years of age, believing that such imminent danger existed, and that there was no person who could avert it, undertook to stop the train, and, knowing that such danger did exist, he went to bridge No. 2, and when he came in sight running backwards, with the conductor on the first car, he made the proper signal for the train to stop, and made such signal a number of times in plain view of the conductor and who saw all of the signals. The train slackened, but opposite plaintiff it appeared that the conductor and train went on to the place of danger, and the plaintiff having but time to consider what he should do, as the train was going by running slowly, acted on the impulse of the moment and jumped to get on the forward platform of the caboose car for the purpose of giving information of the danger; that this action on the part of the plaintiff was not rash or reckless, and only such action of injury were taken as a prudent man would take under the circumstances to save life. The conductor did not obey the plaintiff and did not stop the train; whereby the plaintiff was thrown down and injured in the manner stated in the declaration, substantially disabling him for life.

The third count, in addition to what is stated above, avers that there had been permitted to be piled up by the defendant at the side of the track, which contributed to the plaintiff's injury by his footing to be insecure when attempting to get on the train and by causing him, when thrown down, to roll against the rails.

The demurrer was special, and the substance of the grounds fully stated in the following paragraphs:

(1) Ordinary care on the part of said defendant did not at the time and place in said count mentioned, require, and it did not become, and there became, and was not the duty of, the said defendant, said signals being made, to stop the said train at once or at all, for the purpose stated in said count or otherwise.

(2) The defendant did not disregard any duty, at the time and place in said count mentioned, in not stopping the said train at once or at all, and in not regarding or complying with the said signals.

(3) The said defendant, by its agents and servants, did not continue to run said train along said road, act wilfully, recklessly, wrongfully, or negligently.

(4) The alleged injuries of the plaintiff were not caused by the fault, neglect, or wrong of the defendant, its agents or servants, in any respect.

(5) No relation existed between the defendant and the plaintiff, which imposed upon the defendant, its agents or servants, a duty as to the plaintiff with respect to the running or the conducting of said train at the time and place, and under the circumstances alleged in said count, nor with respect to which any negligence or wrong can be imputed to the defendant.

(6) It does not appear that the watchman, Powell, had authority to direct plaintiff to perform the service in question.

(7) The plaintiff was under no obligation to perform the service alleged to have been undertaken by him.

(8) It does not appear but that the conductor, or person in charge of said train, were in the act of stopping said train, when intended to stop, when plaintiff attempted to board said train, and sustained the alleged injury.

(9) It does not appear that said train did not stop.

(10) No relation existed between the plaintiff and the defendant, whereby any duty was imposed on the defendant, its agents or servants, to have the road-bed of said road clear of obstacles, or not to have gravel and earth piled near its track at the time and place in said count stated, or any duty in regard to the clearing of its road-bed and track at said time and place, or to stop said train, or any duty in relation to the conduct of said train, or regard any signals made by the plaintiff.

(11) Ordinary care and prudence on the part of the defendant, at the time and place in said count mentioned, did not require, and did not become and was not the duty of, the defendant to have the road-bed of said road clear of obstacles, and not to have gravel and earth piled near its track, so that persons whose duty it might be to go on said track, or near the same, should not be subjected to unusual danger thereby.

It was not the duty of the plaintiff to go onto the said or near the same, at the time and place and under the circumstances in said count stated.

Ordinary care and prudence on the part of the defendant at the time and place in said count stated, require, and it then and there become and was not the duty of, the said to stop the said train at once or at all, on said signals made for the purpose stated in said count, or for any other whatever.

Passing upon the questions raised in this case we can only consider the statements of fact made by the plaintiff, and from upon a proper application of the law, determine whether or plaintiff has a cause of action against the defendant.

The demurrer admits the facts properly stated in the declaration to be true. We are permitted to consider only such conclusions only, from the facts stated, as would have strictly within the province of the jury. We cannot consider any conclusion stated by the pleader in the declaration based on the facts or the circumstances surrounding them which would naturally and necessarily result therefrom, and these are the facts to be pleaded.

Applying these rules in view we proceed to consider the averments made in the declaration upon which the decision of the case necessarily to depend. The plaintiff was not in the employ of the company, and it owed no duty to him on that account. He had been requested to go north and signal the train to Powell, and, in making the request, he was told just what to do and how to do it, but no part of the instructions given in the request that the plaintiff should make the attempt to stop the train under any circumstances. It does not appear that he had any authority to make the request. Be this as it may, it certainly appears the plaintiff exceeded the instructions and he was under no legal duty to obey them, however important might be the claims of humanity and his moral obligation.

But under no circumstances would the duty springing from these latter obligations even require him to imperil his own subject himself to any great danger, however laudable and worthy his efforts might be. We must, therefore, regard the facts stated as one in which the service was not voluntary, and which resulted so disastrously to the plaintiff. The duty was voluntarily assumed upon his part, and, therefore, he was at his own risk. Fearing that the signals he had given, and which had been understood by the managers of the train, had not been understood, if understood, were to be entirely disregarded, to the danger and imminent peril of the persons upon the train as just then passing him at a rate of speed not exceeding four miles an hour, he rushed over a sandy embankment upon the side of the track.

WHAT MAY BE
CONSIDERED ON
APPEAL.

SERVICE HELD
VOLUNTARY.

It is held that the plaintiff was not under any legal duty to stop the train at once or at all, on said signals made for the purpose stated in said count, or for any other whatever. The demurrer admits the facts properly stated in the declaration to be true. We are permitted to consider only such conclusions only, from the facts stated, as would have strictly within the province of the jury. We cannot consider any conclusion stated by the pleader in the declaration based on the facts or the circumstances surrounding them which would naturally and necessarily result therefrom, and these are the facts to be pleaded. Applying these rules in view we proceed to consider the averments made in the declaration upon which the decision of the case necessarily to depend. The plaintiff was not in the employ of the company, and it owed no duty to him on that account. He had been requested to go north and signal the train to Powell, and, in making the request, he was told just what to do and how to do it, but no part of the instructions given in the request that the plaintiff should make the attempt to stop the train under any circumstances. It does not appear that he had any authority to make the request. Be this as it may, it certainly appears the plaintiff exceeded the instructions and he was under no legal duty to obey them, however important might be the claims of humanity and his moral obligation. But under no circumstances would the duty springing from these latter obligations even require him to imperil his own subject himself to any great danger, however laudable and worthy his efforts might be. We must, therefore, regard the facts stated as one in which the service was not voluntary, and which resulted so disastrously to the plaintiff. The duty was voluntarily assumed upon his part, and, therefore, he was at his own risk. Fearing that the signals he had given, and which had been understood by the managers of the train, had not been understood, if understood, were to be entirely disregarded, to the danger and imminent peril of the persons upon the train as just then passing him at a rate of speed not exceeding four miles an hour, he rushed over a sandy embankment upon the side of the track.

of the track to the caboose car and made an attempt to get on the platform, and, failing in his effort, was knocked down by the cars, and in this manner received the injury of which he complains, and for which he seeks to recover damages of the defendant. Upon these facts the circuit judge sustained the demurrer, and thinks his ruling was correct.

It is claimed on the part of the plaintiff, (1) that it was the duty of this defendant to make every effort he could to stop the train without being wantonly reckless; (2) that he was guilty of contributory negligence in his attempt to enter the cars in a running train; (3) that it was the duty of the defendant to have stopped its train when signalled by the plaintiff; (4) the defendant is guilty of wanton and wilful negligence in not stopping the train, and in such case the contributory negligence of the plaintiff will not be urged to prevent recovery; (5) that in any event the effort of the plaintiff was to save human life in immediate peril, whether the act of the plaintiff was rash or reckless was a matter for the jury and not for the court.

The first point made by plaintiff's counsel we have already considered. The second point is not well taken. It has always been regarded as negligence for a stranger, and especially must such be the case where the attempt is made, when the train is running across the country, at a point not in near proximity to a station or depot, and where the surroundings are all plainly seen, and forbidding in their nature, as in this case.

The facts stated bearing upon the third point show that the signals were first obeyed, and that the engineer stopped the train north of bridge No. 2, and about 125 feet from the plaintiff. Apparently the signal was without cause. Such a fact, and it coming not from an employee of the defendant but from a stranger, the conductor or engineer would be expected to heed a second warning emanating from the same person. But an engineer is not required to heed the signal of his train given by a stranger when no danger is in sight and reasonably apprehended.

Upon the fourth point the facts as given in the declaration present the evidence relied upon of wantonness and willful negligence. The defendant's management of the train, but of that kind appears therein, and the conclusion stated in the declaration upon these facts is entirely without foundation. Frequently whether the rule stated is correct or not is immaterial; it certainly cannot be applied to the facts stated in this case.

Upon the fifth and last point, we think the case states contributory negligence. It is not only a want of ordinary care but gross negligence on the part of the plaintiff, amounting to extreme rashness.

ness, in his attempt to enter the caboose car in the manner
His act was voluntarily and utterly uncalled for upon the
ated. The judgment of the circuit must therefore be af-

PEELL, C. J., and MORSE, J., concurred.

to Volunteer Servants.—B. having freight to load on a railroad em-
A. to do that work. The cars on which the freight was to be loaded
conveniently located, and a request was made by the conductor
cars be placed in a convenient place. This request was conceded,
g short of brakemen the conductor requested A. to couple the cars,
ing which he was injured through the negligence of the engineer.
was entitled to recover damages of the company. *Eason v. Sabine*,
Co. (Texas, March, 1886), 6 Texas Law Rev. 178.

a person volunteers to assist the employees of a railway company
ing its cars, and is injured by the train, such person, in respect to
ity of the railway company for the injury, stands in the same posi-
ose with whom he associates himself. *Mayton v. Texas & Pac.*
3 Tex. 77.

GARDNER

v.

MICHIGAN CENTRAL R. CO.

(*Advance Case, Michigan. January 6, 1886.*)

as a hole in the planking between tracks, 7 or 8 inches long by 3
Gardner, who was a switchman and had been directed not to couple
rtook to do so on a moving train; his foot caught in the hole and
injured. The hole was of such a character as not to have readily
notice. *Held*,—

t the company was not liable, no negligence being imputable to the
or its employees in not discovering and repairing the hole.

ere a railroad company uses due diligence in the selection of com-
skilful and trusty servants, it is not answerable in damages to
n for any injury received by him in consequence of the carelessness
while both are engaged in the same service of the common master,
little consequence of what grade the servants may be, except as
authority may render the negligence more dangerous, and conse-
crease at least the moral responsibility of any other servant, who,
re of the negligence, should fail to reprove it.

re a brakeman cannot easily uncouple cars when the train is stand-
nd, in endeavoring to uncouple them when the train is in motion,
etween the cars, and there meets with an injury which is caused by
pair in the road-bed, it cannot be ruled he is careless as matter of
e question is one for the jury.

re a man who is employed as a switchman, contrary to the orders
riors, engages in the dangerous work of uncoupling cars, and is
ile so engaged, the railroad company cannot be held liable.
, dissenting.

ERROR to Berrien.

O. W. Coolidge and *Edward Bacon* for plaintiff.

Edwards & Stewart for defendant and appellant.

SHERWOOD, J.—This is an action of trespass on the case, brought by the plaintiff to recover damages for injury sustained by him on the morning of the sixteenth day of May, 1882, at the crossing of the Michigan Central R. tracks over the Berrien & Niles train, and while in the service of the defendant. The cause was tried at the Berrien circuit, before Judge Smith, by a jury, in the February term, 1884, and a verdict was rendered for the plaintiff for \$5000 damages. Defendant brings error.

No question is raised upon the pleadings. From the record it appears that in the city of Niles, Fifth street, running north and south, crosses the Michigan Central R. tracks. At this crossing, besides the main track, there are, of all kinds, six others. Several tracks occupy a large portion of defendant's right of way at this crossing, and 32 feet of the travelled part of Fifth street is very well planked between the tracks by the company with wooden planks, three and one half inches thick, and which were laid down the fall before the injury complained of occurred. The company's station-house, dining-hall, and freight-house, and other departments at Niles, were located at this point, and a large number of trains were arriving and departing during the day and night. The services of a number of men in the yard and freight-house, and about the grounds, were required to look after and do the work at the station. Mr. Gregg was station agent during 1882 and 1883, and had been for more than 30 years. E. D. Bachelor was track-master, and had been years before. He had control of all the work in the yard, but was not at the station much during the night when he was absent he left one of the men employed in the yard named Etzcorn, in charge. It further appears that near the east corner of the planking in Fifth street, and about 12 or 15 feet therefrom, stood a switch. This switch moved the track, and in adjusting it for the passage of trains, and at some time previous to the morning the injury occurred to plaintiff (the exact time, however, is not shown by the record), owing to the failure of the adjustment of the switch, a car-wheel had struck the end of the plank next to the rail of the track, breaking it, and crushing it, making a hole in the surface seven or eight inches long, and between three and four inches wide. This appears to have been the only defect anywhere in the planking or grounds about the station or yard. It further appears that it was the duty of the plaintiff to examine and make discovery of any defect in the planking or other places in the yard, and at once repair the same, and to furnish the track-master for the necessary materials for that purpose, which they were not on hand at the station.

The plaintiff was a resident of Niles, and had been for 18 years at the time he received his injury; was 45 years of age, and had been in the employ of the company continuously in various capacities for 10 years. He had worked with a gravel train, and afterwards at the freight-house and yard at Niles for 10 years, and, immediately previous to the accident, had for six months been one of the hardmen working under the direction of Mr. Bachelor, the foreman. His immediate business at the time he was hurt was that of night switchman, working from 6 o'clock in the evening to 7 o'clock in the morning, and was employed most of his time at the east end of the yard, from Fifth street east. His work was to set switches for trains going east and west, and see that they were set right, and when his work was done he had orders from Bachelor to help the other men make up trains. The plaintiff says, in his testimony, when he went to work upon the yard Bachelor employed him as night switchman; that there was no danger about his business; that Gregg, on the sixteenth of May, 1882, had general charge of the station, but not of the yard; that on the seventh of May previous, Gregg told him "not to undertake to couple cars," that on the morning of that day he was helping a brakeman, and was caught by a car; and Bachelor and Gregg both came to him and told him that was not his business; that he should let them alone and attend to his business; that at about half-past 5 o'clock on the morning of the sixteenth of May, 1882, and about five minutes before he was injured, Etzcorn was coming out of the freight-house with an engine and five cars, and had cut off the end car and put it on top of it to hold it. Plaintiff then asked him where he had those cars. Etzcorn replied, "One in and one out;" to which the plaintiff answered: "Then set the switch over, and motion the engineer ahead," and stepped in to uncouple the cars, pulled the engine back, and laid it on the dead-wood. The cars were in motion at the time, going west, and he moved along between them as they moved, until he got ready to come out, when his right foot fell into the hole in the planks before mentioned, and held him. He looked back to see what held it, and did not have time to get out before the brake struck him and knocked him down, and after being carried several feet, the car-wheel came upon his leg, crushing it to the thigh, rendering amputation necessary. It further appeared from the testimony of the plaintiff that at the time of the accident it was light; that he could see pretty good; that he did not know of the defect in the plank,—if he had, he would have seen it; that he might have passed it a hundred times, and not have seen it; that it was of such a character, if his attention had not been called to it, he could not have seen it; that he had not discovered any defect in the planking at that crossing before; that he had always regarded it as a good and proper crossing for the place and place; and that he was familiar with the station grounds.

The foregoing facts were all uncontroverted by the plaintiff, most of them appeared on the plaintiff's own testimony.

The other testimony went strongly to show that the existence of a defective plank was known only to two of defendant's yardmen, and they both swear that they never had made the fact known to the company or to the yard or station masters; and Mr. L. testifies that when he hired the plaintiff he gave him explicit instructions what he wished him to do; "directed he should use pins, or do any coupling in any way;" that he forbade him to do this again in November following, and that he never commanded that direction; that there was other business in the yard for the plaintiff to do.

The plaintiff now seeks to recover the damages he has sustained in the loss of his limb, alleging in the declaration negligence on the part of the defendant in suffering the defect in the plank to continue unrepaired until it occasioned his injury, averring no neglect on his part contributing to the accident.

The defendant, in making its defence, claimed (1) that the defect in the planking was a very slight one, not known by the plaintiff to exist at the time the injury occurred; that the plaintiff was an employee of the company; that his duties in the yard required him to look after such defects when they occurred; that his particular business, and its locality, furnished him with good, if not better, opportunities to have known of the defect, than the occupation and duties of any other employee of the company, (2) That such defect, if one existed in the planking, which caused his injury, if the result of negligence at all, was that of a fellow-servant, and of which the company gave no previous notice, and was therefore a part of the risk assumed by the plaintiff when he entered the employment of the company as incident thereto. (3) That it was negligence on the part of the plaintiff to attempt to do what he did while the cars were in motion, and that such negligence was really the cause of the injury. (4) That what he did was in actual disobedience of the orders of the yard-master, under whose control and direction he was required to serve, as well as those of the station agent, and without the fault of any one. That for these four reasons the plaintiff ought to recover.

The undisputed proofs show in this case that the defect in the planking complained of was one which might occur any day, from slightly misplacing a switch, or the accidental derailing of a car, or wheel, or from various other causes purely accidental; that the injury to the plank was so small as to escape the notice of all the persons in the yard except two, and even of the plaintiff, who was daily within 10 or 12 feet of it, from once to a dozen times a day, and it would appear that even the two persons who did see it did not deem it of

NO NEGLIGENCE
IN NOT REPAIR-
ING DEFECT.

enough to report it to the yard-master, or repair it them-
 selves, it being their duty so to do if it was dangerous, and there
 pretence that the company had actual notice thereof. There
 testimony to show, or tending to show, that any of the per-
 sons were careless, incompetent, or unskilful when they were em-
 ployed by the company and placed in charge of its business at
 station; but, on the contrary, the undisputed evidence is that
 they were all very competent men, who had had long experience in
 the management of the business. It would seem that the defendant had
 discharged its whole duty in the premises, and it is quite clear, I think,
 that the only ground upon which plaintiff can rest his claim
 is that of negligence of a fellow-servant engaged in the same
 employment; and the rule is well settled that when the company
 exercises due diligence in the selection of competent, skilful, and
 careful servants, it is not answerable in damages to one of them for
 injury received by him in consequence of the carelessness of
 another, while both are engaged in the same service of the com-
 pany. *Farwell v. Boston & W. R. Corp.*, 4 Metc. 49; 2
 Esp. Neg. 824.

A person "who engages in the employment of a railroad com-
 pany for the performance of specified duties and services, for com-
 pensation, takes upon himself the natural and ordinary risks and
 incidents to the performance of such service," and these in-
 clude the perils arising from the carelessness and negli-
 gence of those who are fellow-servants, or engaged in the same
 employment, and it is of little consequence of what
 grade the servants may be, except (as is well said by Chief
 Justice Cooley in his work on Torts) "as superior authority may
 determine the negligence more dangerous, and consequently increase
 the moral responsibility of any other servant who, being
 cognizant of the negligence, should fail to reprove it," (Cooley, Torts,
 and this doctrine is fully supported by the following author-
 ities among others: 2 Thomp. Neg. 927; *Gallagher v. Piper*, 16
 (N. S.) 679, 694; *Wigmore v. Jay*, 5 Exch. 354; *Feltham
 v. Land*, L. R. 2 Q. B. 33; *Chicago, etc., R. Co. v. Murphy*, 53
 Ill. 6; *Summersell v. Fish*, 117 Mass. 312; *O'Connor v. Rob-
 erts*, 20 Mass. 227; *Zeigler v. Day*, 123 Mass. 152; *Warner v.
 City Co.*, 39 N. Y. 468, 470; *Coon v. Syracuse, etc., R. Co.*,
 10 Y. 492; *Columbus, etc., R. Co. v. Arnold*, 31 Ind. 174;
W. Vermont, etc., R. Co., 32 Vt. 473; *O'Connell v. Baltimore
 R. Co.*, 20 Md. 212; *Ryan v. Cumberland, etc., R. Co.*, 23
 Ill. 384; *Pittsburgh, etc., R. Co. v. Devinney*, 17 Ohio St.
 384; *Morgan v. Railway Co.*, L. R. 1 Q. B. 149; *Gilman v. East-
 ern Corp.*, 10 Allen, 233; *Lawler v. Androscoggin R. Co.*, 62
 Me. 33; *Quincy Min. Co. v. Kitts*, 42 Mich. 34; *Michigan Cent.
 R. Co. v. Austin*, 40 Mich. 247; *Day v. Toledo, C. S. & D. R.
 Co.*, 2 Mich. 523; *Crispin v. Babbitt*, 81 N. Y. 516; *Brick v.*

RISKS OF SER-
 VANTS—EMPLOY-
 MENT ASSUMED.

Rochester, N. Y. & P. R. Co., 98 N. Y. 211; McCosker Island R. Co., 84 N. Y. 77; Wright v. New York Cent. 25 N. Y. 565.

It is said by Mr. Justice Story, in speaking upon the "We are aware of no principle which would except the person from the carelessness and negligence of those who are in the same employment. These are perils which the servant is to know, and against which he can as effectively guard, as the master." Farwell v. Boston & W. R. Corp., 4 Metc. 49.

Especially is this true in this case, under the circumstances disclosed in this record; for it is shown to have been a part of the duty of the plaintiff to have discovered the defect in the plank complained of, and to have repaired the same, as well as the duty of the track-master. I think it must be conceded that had the plaintiff not gone in between the cars while they were in motion, he would not have received his injury. He was not required to do so for any person, and it was most certainly no part of his duty. It is claimed by counsel for plaintiff that plaintiff was acting under the direction of Etzcorn at the time the injury occurred. The evidence, however, does not support this claim. Etzcorn, the morning, he says, doing his own coupling and uncoupling. Plaintiff says that he (plaintiff) asked Etzcorn, as he was making a change of cars, "What next?" and Etzcorn replied, "One car in and one car out," and that this is all that was said; and plaintiff says he did not ask plaintiff to do anything that morning, nor ask him to help him. Clearly this talk shows no direction to plaintiff to uncouple the cars. Usually the movement of cars is under the direction of the brakeman, and contributory negligence on his part in his failure to make the coupling while the cars are in motion, or in his failure to regulate the movement of approaching cars when it is within his power to do so by the exercise of ordinary care, has been held sufficient to prevent his recovery for injuries received. Muir v. Illinois Cent. R. Co., 36 Iowa 462; Marsh v. South Carolina R. Co., 56 Ga. 274, 277.

I am inclined to the opinion, however, that the correct principle should be taken upon this subject in *Snow v. Housatonic R. Co.*, 441. In that case the court held that if a brakeman cannot easily uncouple cars when the train is still, and, in endeavoring to uncouple them when the train is in motion, he steps between the cars, and there meets with an injury which is caused by a want of repair in the road-bed, it is ruled he is careless, as a matter of law, but the question is left for the jury. *Belair v. Chicago, etc., R. Co.*, 43 Iowa, 66.

We are relieved from further consideration of this subject, however, in the present case. It clearly appears by the record that the plaintiff's duties were those of switchman, and that when he

NEGLIGENCE A
QUESTION FOR
JURY.

sequently, he was ordered by those who had the authority to him what to do,—not to attempt to perform the kind of service which he received his injury,—and that, in open violation of the orders, and without the direction of any person, he undertook to perform the hazardous work of uncoupling, which was attended with such disastrous results. Under the circumstances, and on any undisputed, I think it must be held that the plaintiff voluntarily took the risk; that it was his own voluntary act, and the defendant cannot be held liable upon the facts appearing in the record.

These views render discussion of the other points nearly unnecessary. The judgment must be reversed, and a new trial granted.

MR. BRELL, C. J., and CHAMPLIN, J., concurred.

MR. JUSTICE, J. (dissenting).—I think this case was properly submitted to the jury, and that the verdict should not be disturbed. From the plaintiff's evidence, as I read the record, it appears that after the plaintiff was ordered not to couple cars, he was told by the yard-boss, whose orders he was acting, on the seventh of May, that he should help the boys in the morning; that he wanted to help John Etzcorn. Plaintiff says to the yard-

PLAINTIFF ORDERED TO DO THE WORK.

"All right; you told me once that I should do this work,—I had nothing to do with it." The boss replied: "Do not help it now. The trains don't get off in the morning. The South Bend train is late pretty nearly every morning. We do not get men enough to get the cars ready. You must help them." This seems to be a plain command to plaintiff to do this whenever the trains were late, and did not confine him to a particular morning. Plaintiff then helped the boys every morning, in coupling and uncoupling cars, until the accident.

The testimony introduced on the part of the plaintiff—and we have nothing to do with the evidence on the behalf of the defendant in considering the question whether the case should have been submitted to the jury—tended to show that this defect had existed for a long time. That it was a dangerous break the sequel shows. It was the duty of the yard-master to see to it that this track, like the others, being almost constantly used in moving cars and coupling them in this yard, was in a safe condition, so that the lives of the men who were compelled to do the coupling on this ground, in their employment, were not endangered, or their persons put in jeopardy, and, being in charge of the yard, with this duty incumbent upon him, his negligence would be the negligence of the company.

The question whether he was negligent was, under the plaintiff's evidence, in my opinion, a question for the jury, as was also the negligence of the plaintiff.

The plaintiff, under his proofs, was entitled to go to the jury. The question as to whether he or the defendant's witness was believed was also a matter for them to determine. The verdict was in his favor, and I can find no error in the record.

Negligence of Fellow-servant—Care in selecting Employees.—A company is not liable for damages caused by injury to one of its employees on a train, and which resulted from the negligence of another employee of such company on the same train, unless it be made to appear that the company was not used in selecting such other employee, or that he being injured was negligent, that fact was known to the company. *Gulf, Colo. Co. v. Faber*, 68 Tex. 344.

Fellow-servants—Defective Machinery.—Where it is the duty of a company to furnish sound material and machinery, and defective machinery is furnished to the servant, the rule which exempts the master from liability for injury to a servant through the negligence of a fellow-servant does not apply. *Cunningham v. Union Pac. R. Co.* (Utah, Aug. 25, 1885), 7 Pac. Repr. 828.

Fellow-servants—Pleading and Procedure—Nonsuit.—In an action for damages for negligently causing the death of an employee, if the plaintiff alleges that the acts and omissions constituting the negligence were committed by the defendant itself, as employer, the court cannot grant a nonsuit if they were those of a fellow-employee of the deceased; and, consequently, the question of the liability of a common employer for a co-employee's negligence cannot arise on demurrer to the complaint. *Brown v. Central Pac. R. Co.* (California, Dec. 1885), 7 Pac. Repr. 828. And it is not error to grant a compulsory nonsuit and refuse to take it off, in an action for damages against a railroad company for negligence resulting in the death of an employee, where the deceased and the person guilty of negligence were fellow-laborers, and the evidence was evidence of contributory negligence. *Keys v. Penna. Co.* (Iowa, 1886), 1 Central Repr. 893.

Fellow-servants—Wilful Neglect.—Where an employee is killed by the wilful negligence of his co-employee, the former's representative cannot recover of the employer (under Kentucky G. S. 57, § 3), even though the employees were in the same line of service and co-equals. It is held that an engineer and a brakeman on a train are not co-equals. *Louisville & N. R. Co. v. Brook* (Kentucky Court of Appeals, June, 1885), 7 Kentucky Repr. 110.

Fellow-servant—Negligence of Engineer.—If a yardman is killed while coupling cars by request of the engineer, by the negligence of the engineer, it is not being a part of the duty of the yardman to couple the cars, that the recovery cannot be had against the railroad. To entitle to a recovery it must be shown that the deceased was in the line of his employment, and met his death by the negligence of a fellow-servant having control of him. *Bradley v. R. Co.*, 14 Lea, 374.

Negligence of Fellow-servant—Injury while operating Road.—Where a member of a gang engaged in the construction of a railroad is injured by the negligence of a fellow-servant in allowing a large stone to fall on his hand, he is not injured while engaged in the use and operation of the railroad, within the meaning of Code, § 1307, and the company is liable. *Matson v. Chicago, etc., R. Co.* (Iowa, Dec. 1885), 25 N. W. Rep. 100.

LOUISVILLE AND NASHVILLE R. Co.

v.

MOORE.

(Advance Case, Kentucky. March 6, 1886.)

A freight train was uncoupled at a highway-crossing to allow travellers to pass, both the engineer and conductor going to the telegraph office, leaving the fireman, an inexperienced boy of 20 years, in charge of the engine, and directing Moore, the head brakeman, to make the coupling. The fireman backed the engine and cars together with unusual force, and Moore was injured. *Held—*

- (1) That the company was liable.
- (2) That the engineer and conductor occupied toward Moore the position of vice-principals of the company.

APPEAL from Hardin Circuit Court.

Wm. Wilson and Wm. Lindsay for appellant.

Montgomery & Poston and W. P. Thorne for appellee.

HOLT, J.—The appellee, J. M. Moore, while in the employ of the appellant, the Louisville & Nashville R. Co., and when engaged upon a local freight train, was, while attempting to make a coupling, caught between the cars, and one of his feet and legs so injured as to necessitate its amputation.

FACTS.

The train consisted of the locomotive and tender and either twenty-two or twenty-three freight cars; the crew, of a conductor, engineer, fireman and three brakemen: and of the latter the appellee was the head one. The train had been side-tracked, and then cut in two at the crossing of a road, to enable travellers to pass. The "live portion" of it consisted of the locomotive and three cars; the "dead portion," of probably nineteen cars, and the space between the two portions was about 50 or 60 feet. A short distance down the side track beyond where the train had been thus divided was a barrel of flour to be taken on board; and to save backing down after it the other two brakemen went after it. The testimony tends to show that they had only brought it a part of the way; and that one of them had returned, and gotten upon a car of the dead portion of the train when the accident occurred. After the train had been thus side-tracked for an hour the conductor started toward the telegraph office, which was near by, and where the engineer already was; and as he did so he ordered the appellee, Moore, to couple the train. The latter in obedience to this order went to the end of the dead portion of the train nearest to the live portion; and the latter backed against the former with great and unusual force, the fireman alone being upon

the engine and operating it. The evidence shows that he was a boy—at least only twenty years old—and inexperienced as the record discloses he had never before worked a train. When the live part of the train struck the dead portion, it ran back about 100 yards, either from the force of the impact together, or else because the fireman, without waiting to make the coupling had been properly and safely made, kept on back of the train. He testifies that he continued to back the train back of the brakemen, but not the appellee, signalled him to stop. If so, it is probable that it was the one who had returned on the trip for the flour.

It is evident, however, that the two portions of the train ran together with great force. The appellee had gone between the cars to make the coupling; to save himself he caught hold of a ladder upon the side of the box car next to him, and with the part of the dead portion of the train; but the wheel of the box car caught his foot; and it was cut off as he was dragged along with the train, and his leg ground and broken off piece by piece, and wrenched from the knee socket, and portions of the bone along the track.

He brought this action, not by virtue of any statute, but by the general law, to recover damages upon the ground that the injury resulted from the wilful and gross neglect of the employees in charge of the train. A special verdict was returned by which the jury fixed the entire damages at \$9000. \$8000 were given as compensatory, and \$1000 as exemplary.

The motion of the appellant for a peremptory instruction was properly overruled. The appellee was ordered to produce a superior officer of the train to make the coupling. It was the duty of the latter after giving this order to see and know that the engineer was at his post; and that at least a person competent to operate the train properly was in control of the engine. The appellee had no right, before giving the order, to demand information of the conductor as to who was to engineer the train. He had the right to demand that it would be done by the proper person, or one competent to do so.

Moreover it appears that immediately after the conductor gave the order he found the engineer in the telegraph office, and that he did not countermand the direction he had given to the appellee.

It is urged, however, that the injury happened without the knowledge or intervention of the conductor or the engineer. The appellee saw before he attempted to make the coupling that the fireman was controlling the engine, and that the train was moving rapidly; that the accident resulted, therefore, from the neglect of the appellee, the fireman, and another brakeman.

two latter had no control over the appellee, but were fellow-servants in a common employment, that therefore the peremptory instructions should have been given. We have already seen that the statement is incorrect as to the conductor; but if it was the intention of the appellant, as appears from the testimony, to permit the fireman upon its freight trains to act as engineer in coupling and switching the trains, then if the fireman was so acting in this case he was to all intent and purpose the engineer of the train, and not the common equal fellow-servant of the appellee; and the doctrine of *respondet superior* applies.

It was gross neglect upon the part of the conductor to permit an inexperienced boy to operate the train. He ordered the appellee to make the coupling; and before it was attempted he knew the fireman was not upon the train, and that no one was to move it save the fireman; and yet he allowed it to be so. Numerous interrogatories were propounded to the jury; by the appellee; eighteen by the appellant, and ten by the court, thirty-six in all; and the jury found specially that the injury was caused by the gross and wilful neglect of the conductor of the company, and that the conductor and engineer were both guilty; fixed the amount of the damages; also that the appellee was not guilty of any contributory neglect; that notwithstanding the care and conduct the employees of the appellant could, by the exercise of ordinary care, have prevented the injury; that the fireman was competent to manage the engine, and that it was his duty to back the train to see that the appellee had made the coupling safely; that the appellee had been in the appellant's employ about two weeks, had been acting as a brakeman for four years, and was an experienced one; that when he undertook to make the coupling he did not let the pin fall and stoop to pick it up and thus get caught; that the fireman was not accustomed to be permitted to operate the engine; and was not ordered by the conductor or the engineer to take charge of it when the appellee was hurt; and that the latter saw no one upon it but the fireman when he undertook to make the coupling; that the fireman was guilty of wilful neglect in operating the train when the appellee was injured; and that it was the custom of the fireman upon the appellant's road in the absence of the engineer to operate the train in coupling and switching freight trains; that the conductor did not know when he ordered the train to be coupled that the fireman was not upon the engine and no one but the fireman; that he and the engineer, when the train was put in motion, were in the telegraph office, 125 yards distant from the engine, and gave necessary orders, but knew it was done by hearing the jar; that he ordered to the appellee by the conductor to couple the train in a positive one; that the appellee did not signal the fireman to get upon the train, but that the other brakeman did; that when the

appellee attempted to make the coupling the live portion of the train was moving rapidly, but he did not see it in time to save himself; that he had never before known this fireman to act as engineer; that the latter did not back the live portion of the train in a careful manner or give the appellee time to make the coupling; but believed when he continued to back it that it had been made safely, and did so by reason of the signal from the other brakeman.

It is contended that the general findings, such as the existence or non-existence of negligence, must be controlled by the finding of specific facts; and that as the jury found that the fireman was not directed by the conductor to move the train, and the appellee knew that he was doing so, therefore it appears by the facts found that the conductor was not guilty of gross neglect, while the appellee knowingly brought about his injury; and that therefore the lower court should have rendered a judgment upon the findings for the company. The same reasons, however, which are mentioned above for not giving a peremptory instruction forbade such a judgment.

When one enters upon an employment for another he assumes all the ordinary risks attendant upon it; and where a number of persons enter a common employment for another, all being upon a common footing and none superior or subordinate to the other, and one receives an injury by the neglect of another in the discharge of the undertaken duty, they are regarded as the agents of each other, and no recovery can be had against the employer.

It was once the English rule that it did not matter if the injured servant was subordinate to the neglectful one and under his control; or if they were engaged in different grades and departments of the service. To hold the master responsible he must have had some personal connection with the injury, provided of course that he was not neglectful in the selection and retention of his servants.

This rule in that country seems yet to prevail, as well as in many courts of this country, save that if the injured party be in a different grade of the service from the neglectful one, then the employer may be made responsible. The establishment of this rule in many of our States is largely due to the influence of the opinion of Chief Justice Shaw in the case of *Farwell v. Railroad Co.*, 4 Met. 49. The courts of Ohio and this State have, however, extended this rule; and the leaning in New York is in the same direction; and they hold not only that the master is liable for an injury to one servant by the neglect of another if they are engaged in different grades of the employment, but that he is also liable, although they may be engaged in the

NEGLECT IN PER-
MITTING FIRE-
MAN TO RUN EN-
GINE.

RISKS ASSUMED.

ENGLISH RULE
AS TO CO-SER-
VANTS AND
GRADES OF EM-
PLOYMENT.

RULE IN AMERI-
CA—AUTHORI-
TIES.

same common employment, provided the neglectful one is superior to or in control of the injured one.

Railroad Co. *v.* Stevens, 20 Ohio 415; Same *v.* Keary, 3 Ohio State, 201; Malone *v.* Hathaway, 64 N. Y. 5; Railroad Co. *v.* Collins, 2 Duvall, 114; Same *v.* Cavens' Adm'r, 9 Bush, 559. The rule as thus laid down is, to our mind, the proper one and consistent with public policy. The Supreme Court of the United States in the case of the C. & M. & St. P. R. *v.* Ross, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. Cas. 501, after ably reviewing both the English and American cases, has adopted the Ohio and Kentucky rule as the correct one.

Here the conductor had the entire control of the train; and subject to him to a certain extent, the engineer had control of the brakemen. These two superior officers were the persons^{CONDUCTOR AND ENGINEER VICE-PRINCIPALS.} representatives of the corporation as to the appellee, and for the gross neglect of either the corporation is responsible. In no proper sense of the term were they fellow-servants of the appellee. The brakemen were fellow-servants under the control of these two officers who represented the corporation. Their acts were its acts, and their neglect or that of the fireman, if he was permitted to act as en-^{BRAKEMEN FELLOW-SERVANTS.}gineer, was the neglect of the company. It was constructively present in them.

Applying the rule thus sanctioned by the Supreme Court, the appellant is responsible for the appellee's injury.

All necessary questions, indeed more than were necessary, were asked of the jury either to develop the facts fixing or excusing negligence. It is urged that some of the answers are unmeaning and cannot be understood, especially to the fourth interrogatory propounded by the court, and which included several distinct questions. It is, however, evident that the answer was to the first one, and it being answered in the negative no answer was necessary to the others as they were altogether based upon the idea of an affirmative answer to the first one.

The three general instructions defining the different degrees of negligence were correct, beyond question, unless it be the second one, and it was, if anything, more favorable to the appellant than it had a right to expect.

It is urged that no instruction was given defining contributory neglect; but the jury found that the appellee had not been guilty of any, and no instruction upon this subject was asked^{CONTRIBUTORY NEGLIGENCE.} by the appellant. Moreover the jury found that notwithstanding the acts of the appellee, yet the injury could have been avoided by the exercise of reasonable care upon the part of the appellee's other employee. The verdict in the light of others which have been sustained by the courts of the country, and upon the facts of the case, cannot be regarded as excessive. The appellee is shown

to have been an excellent brakeman and in the prime of manhood, dependent upon his labor for his living, uneducated, unfitted for any other employment save one of manual labor. He is now disabled for life and unfitted for the calling in which he had educated himself, and which he appears to have followed. This has resulted, as the jury have said, and as we think from the gross and wilful neglect of those whom the plaintiff had placed in charge of him in the discharge of what is an exceedingly dangerous duty.

Judgment affirmed.

HOWARD *et ux.*

v.

DENVER AND RIO GRANDE R. Co.

(*Advances Case, U. S. Circuit Court, D. Colorado. March 23,*

A fireman on a passenger train, and an engineer in charge of and connected with such train, but belonging to the same railroad company, fellow-servants, and where the fireman is killed by a collision between the engine and the train caused by the negligence of the engineer the company will not be liable.

ACTION against a railroad company to recover damages for the death of an employee caused by negligence. Plaintiffs obtained a verdict, and defendant moves for a new trial. The matter is stated in the opinion.

Rogers & Cuthbert for plaintiffs.

E. O. Wolcott for defendant.

BREWER, J.—This is a motion for a new trial which I will refer to the direction of the trial judge; has been referred to the decision. As I was not present at the trial, I feel at liberty to consider only the principal question upon which the ruling of the trial judge was made. The facts which present that question are: The plaintiffs are the parents of one John H. Howard, who on May 19, 1883, was killed in a collision on defendant's road. Howard was employed as a fireman, working on the regular passenger train running west on that day from Pueblo to Denver. That train was running on schedule time, and about a quarter of eight miles west of Badger Station collided with a light engine running eastward, under the management and control of one William Ryan, its engineer. Ryan neglected his instructions, and his negligence was the proximate cause of the collision. There was no negligence or incompetence on his part, or of negligence in employing

under which he was acting and which he disobeyed. The trial judge rested simply on the fact of his negligence. The trial judge held that his negligence was the negligence of the company, and that he was not a fellow-servant with the deceased. This, then, is the single question presented. The rules of the company provided that an engineer running a light engine like this, without any separator or conductor, should be regarded as both engineer and conductor. The question, therefore, is distinctly presented whether, in case of an accident between a train and an engine, the negligence in the management of the engine, whereby injury results to the employees on the train, is to be regarded as the negligence of the company, or only the negligence of a fellow-servant. Obviously, the question is of no slight importance.

It will not be doubted that the early current of judicial decision in this country was such as to affirm that employees, situated as the deceased was, and the deceased, were fellow-servants. The leading case was that of *Farwell v. Boston & Maine R.R. Co.*, 4 Metc. 49, in which the opinion was written by Justice Shaw. He there stated the rule to be that all persons

FIREMAN AND
ENGINEER HELD
CO-SERVANTS—
AUTHORITIES.

employed by the same master, and engaged in a common business, were fellow-servants, no matter what the relation in which they stood to each other. This case was generally followed, in this country and England, and the principles enunciated were accepted as correct. Nor, on the other hand, can it be contended that the later current, both of judicial decision and of public action, is away from that ruling in many respects.

The action of the legislature in at least two States—Kansas and Ohio—where the railroad company is made responsible to every employee for the negligence of every other employee, so that in those States the doctrine of fellow-servants in respect to negligence has ceased to have any force.

STATUTES ABOL-
ISHING CO-SER-
VANT RULE.

Outside of these States, by the rulings of many courts, the case of *Farwell v. Railroad Co.* has been much limited and restricted. One marked limitation is this: Wherever the master owes an absolute duty to the employees, and instead of discharging that duty himself intrusts it to an agent or servant, such agent or servant is not a fellow-servant within the meaning of the rule of liability for negligence. Thus, the master owes to every employee the duty of providing a reasonably safe place in which to work, and reasonably safe instruments and machinery with which to work. This may be called a general and absolute obligation. If the discharge of this obligation is entrusted to an agent or servant, such agent or servant is the fellow-servant of the master, and any negligence on his part is the negligence of the master.

SERVANT DOING
MASTER'S DUTY
NOT CO-SERVANT.

In the case of *Calor v. Charlotte, C. & A. R. Co.*, decided by the supreme court of South Carolina at the April term, 1885, the court held that the servant was not a fellow-servant.

the plaintiff, a locomotive engineer, while running his engine between Columbia and Charlotte, was injured through the negligence of a section-master and supervisor of the track-layers, who, in disregard of the appropriate signals, took up a part of the track, and thus derailed the engine. The court held that the true test was whether this section-master was employed to charge the duties of the master, and also that it was the duty of the master to provide a suitable and safe place for his employees to work in and on, which duty had, in this case, been committed to the section-master. His negligence was therefore properly judged the negligence of the master.

The same principle was recognized in the case of *Morrison v. Richmond & A. R. Co.*, decided by the court of appeals of Virginia in April, 1884, and reported in 8 Virginia Law J. 540. In that case, the decedent, whose administrator was plaintiff, was killed on a material train. A section-gang at work on the track had mislaid the signal the train, although it had the rails misplaced. The consequence, the train was derailed, and the decedent injured and died in eight hours. The court held that the section-master and the decedent were not fellow-servants, saying that "where a master delegates to an agent or employee the performance of duties, the law makes it incumbent on the company to perform those duties; and are the acts of the company,—his negligence is the negligence of the company;" citing *Brothers v. Carter*, 52 Mo. 372; *Boston & A. R. Co.*, 53 N. Y. 549; *Corcoran v. Holt*, 100 N. Y. 517; *Mullan v. Philadelphia & S. M. S. Co.*, 78 Pa. 481; *Ryan v. Chicago & N. W. R. Co.*, 60 Ill. 171.

The case of *Davis v. Central Vt. R. Co.*, 55 Vt. 84, was also considered upon this point. In that case it appeared that the death of the decedent was caused through the negligence of the company's bridge-builder, and of the road-master in repairing, a culvert, and out, whereby a foreman was killed. The company was held responsible. The court said:

"The bridge-builder and road-master, while inspecting the culvert for the defectively constructed culvert, were performing a duty which, as between the intestate and defendant, was incumbent on the defendant to perform. Their negligence constituted the negligence of the defendant."

Among other cases affirming the same doctrine may be mentioned the following: *Lewis v. St. Louis & I. M. R. Co.*, 59 Mo. 239; *O'Donnell v. Railroad Co.*, 59 Pa. St. 239; *Nashville & C. R. Co. v. Carroll*, 6 Heisk. 348; *Tierney v. Minneapolis & St. P. R. Co.*, 33 Minn. 311; *Atchison, etc., R. Co. v. Holt*, 29 Kan. 11; *Am. & Eng. R. R. Cas.* 206; *Fuller v. Jewett*, 80 N. Y. 61; *Slater v. Jewett*, 85 N. Y. 61; *Gunter v. Graniteville Ma. R. Co.*, 18 S. C. 262; *Gilmore v. Northern Pac. R. Co.*, 15 Ariz. R. R. Cas. 304, and note.

Another important limitation is that where an employee is in charge of the entire operations or of a separate department, so that in respect to the entire work, or the separate department, he has full control, is, so to speak, a vice-principal *an alter ego*—of the master, his negligence is that

VICE-PRINCIPAL
RULE.

of the master, and not that of a fellow-servant. Thus the general superintendent of a railroad, the superintendent of bridges, the road-master, the foreman in charge of the machine-shops, have all been held vice-principals, and their acts the acts of the master. In a late case, which has attracted great attention, that of the *Go. M. & St. P. R. Co. v. Ross*, 112 U. S. 377; s. c., 17 Am. R. R. Cas. 501, it was held that the conductor of a train was within the same category. The reason underlying this is the reason of the extent of the authority conferred, the power of discretion vested in such employee, the fact that practical supervision and control is given to him, it is fitting that he should be held as the active, present representative of the master,—one whom the master has placed such confidence, and to whom he has transferred his powers as to make him his other self. Among authorities affirming this doctrine may be cited the following: *Railroad Co. v. Fort*, 17 Wall. 553; *Grizzle v. Frost*, 3 Fost. & 2; *Cook v. Hannibal, etc., R. Co.*, 63 Mo. 397; *Whalen v. Mary Church*, 62 Mo. 326; *Chicago, etc., R. Co. v. Bayfield*, 101 Ill. 205; *Lalor v. Chicago, etc., R. Co.*, 52 Ill. 401; *Mullan v. Philadelphia, etc., S. Co.*, 78 Pa. St. 25; *Kansas Pac. R. Co. v. 19 Kan.* 267; *Malone v. Hathaway*, 64 N. Y. 5; *Brickner v. New York Cent. R. Co.*, 49 N. Y. 672.

Effort has been made to engraft another exception, to the effect that where the master sees fit to place one of his employees in charge of the direction and control of another, the relation of fellow-servants does not exist, and the latter, in all his actions, is the representative of the master, and his negligence the negligence of the master. As to the subdivisions of service,—no matter how minute,—in all the work,—no matter how small the work,—there is generally a man or boss in charge, having control and direction, though working with the others, the recognition of such an exception thus broadly stated, would largely increase the responsibility of the master. Nevertheless, the rule has been thus laid down by several courts. The supreme court of Kentucky, in *Wille & N. R. Co. v. Bowler*, 11 Alb. Law J. 119, in which a section-hand had been injured through the negligence of a section boss, decided "that the only sound rule is to hold the superior, which can only act through its agents, responsible for injuries resulting to the subordinate from the negligence of its immediate superior or party having control over him." Sim-

SERVANT AS
REPRESENTATIVE OF MASTER.

ilar was the ruling of my predecessor, Judge McCrary, in cases, among them that of *Railway Co. v. Ross*, affirmed supreme court, 112 U. S. 377; s. c., 17 Am. & Eng. R. R. C. Such also was the decision of the supreme court of Ohio in *Way Co. v. Keary*, 3 Ohio St. 201, in which case the court "No service is common that does not admit a common position, and no servants are fellow-servants when one is placed in control over the other."

another exception which has received considerable recognition at where two employees, though serving the same employer, are engaged in a different class of work they are not to be regarded as fellow-servants, within the rule. Thus, in Illinois, it has been held that a book-keeper in a railway office is not a fellow-servant with an engineer (Chicago, etc., R. Co., 1887, 47 Ill. 110); and also that a laborer in the carpenter-shop is not a fellow-servant with the engineer (Ryan v. Railway Co., 1877, 117). A late case was decided by Mr. Justice Miller of this court (Garrahy v. Railroad Co., reported in 25 Fed. Rep. 258), in which it was ruled "that a common hand, engaged in the business of distributing iron rails along the side of the track to be laid in place of other rails removed from the track, and under the control of six or eight other men, of a boss or foreman, is not in the same employment as a man controlling or managing a switch engine not used in carrying these rails, but in moving and transferring from one place to another cars not engaged in the business of laying said track."

These are the only exceptions which it seems to me can in any case be invoked to sustain the ruling of the learned trial judge; and I am constrained to believe that neither of them is sufficient. As far as the place and machinery are concerned, both were safe. There is no pretence that the track was not in good order, or that the engines or other instruments for the movement and control of the train were not sufficient. This statement is made in respect to the matter ruled upon by the trial judge, and alone I feel at liberty to consider. It will not do to say that because Ryan's engine was in the way, and collided with decedent's train, the track was not clear, and therefore the master failed in his duty of providing a safe place for the employee to go in and upon. The negligent use by one employee of perfectly good machinery will seldom be adjudged a breach of the master's duty of providing a safe place for other employees. Such a conclusion would make any negligent misplacement of a switch, or a negligent collision of trains, even any negligent dropping of a load about a factory, a breach of the duty of providing a safe place.

The true idea is that the place and the instruments must themselves be safe, for this is what the master's duty fairly requires, and not that the master must see that no negligent handling by an employee of the machinery shall create danger. Neither can it be said that Ryan and decedent were engaged in a different kind of work. Both were employed in the movement of trains, — the same kind of service. True, they were on different trains, and at the time of the accident had no opportunity of noticing the presence of each other until too late to prevent the collision. But, being engaged in the same kind of service and on the same division, they must naturally have often been thrown into contact and

EMPLOYEES IN
DIFFERENT
KINDS OF WORK.

FACTS OF CASE
CONSIDERED.

had ample opportunities for mutual supervision. To sub beyond the class of service, into the place of work, would be an exception beyond well-recognized limits. It would make the men non co train not fellow-servants with those on another train. Carpenters and machinists in one room strangers in service to those of another; one gang of section-men not co-employees with another,—and all because, at the time, their places of work had to be different. In the Garrahy Case, *supra*, Mr. Justice Brandeis carefully notes the complete separation in the class of service of the two employees, while in the Randall Case, to be considered hereafter, the supreme court treated the fact that the employees were working on different trains as entirely immaterial. An employee engaged in train service knows that other trains besides his own are running, and may fairly be considered as contracting to take the risk of the negligence of the employees managing such trains. He must expect to be employed now on one train and now on another, and to be thus thrown into contact with the other employees in the same service, to know himself what is proper care in such work, and to detect any evidence of carelessness on the part of those with whom he is in service. Every consideration which exempts the master from liability for the negligence of a co-employee seems to bind to the same class of service together as fellow-servants.

Neither can this be considered a case of the negligence of an employee in charge of a department. While, by the rule of the company, the engineer in charge of a light engine is to be regarded as the conductor, yet this rule obviously contemplates the master's reports, etc.,—the mere duties owing to the company for the purpose of giving and preserving complete information of the engine's movements,—and should not be construed, even if it were possible, for a simple rule so to do, as lifting one with so little power as a single subordinate, into the dignity of a departmental conductor. We should always look to the substance of things, and not dignify with undue importance that which is properly but a regulation of details, or a mere means of information. It is not that an engineer in charge of a moving engine is placed in a position in which his negligence may cause serious disaster, or that every one in control of a power so tremendous as steam, whether in a moving or stationary engine. But the possibilities of disaster from his negligence do not make him any the more a representative of the master. They simply cast upon the master the duty of greater care in his selection. To make one as the controller of a department properly the representative of the master, his duties should be principally those of direction and control. He should have something more than the mere management of machinery; he should have subordinates over whose various actions he exercises supervision and control, and not a mere assistant to him in the working of machinery. He should have control over an

partment of service, and not simply of a single machine in that
ce. He should be so lifted up, in the grade and extent of his
s, as to be fairly regarded as the *alter ego*—the other self—of
master. I think I only voice the general judgment of the
ession in saying that the decision in the Ross Case was a sur-
and that it carried the doctrine of departmental control to
xtreme. To extend it to the case of an engineer running a
engine, with no train,—no subordinate save the fireman,—
d, it seems to me, be judicial legislation.

ave thus far considered this case upon general principles. I
turn to a case in the supreme court, recently decided, that of
all v. Baltimore & O. R. Co., 109 U. S. 478; s. c., 15 Am. &
R. R. Cas. 243, which seems to me so closely in point as to
el the decision here. In that case a brakeman unlocking a
h, to enable his train to pass from one track to another, was
ed by the tender of a freight-engine in no way connected
his train. Negligence was charged upon the engineer man-
y this engine. The supreme court unanimously held the
man of the one train and the engineer of the separate engine
y-servants. In the opinion we find this language:

ersons standing in such a relation to one another as did this
tiff and the engineer of the other train are fellow-servants,
ding to the very great preponderance of judicial authority in
country, as well as the uniform course of decision in the
of Lords, and in the English and Irish courts, as is
ly shown by the cases cited in the margin. They are em-
d and paid by the same master. The duties of the two bring
to work at the same place at the same time, so that the neg-
ee of the one in doing his work may injure the other in doing
ork. Their separate services have an immediate common
t, the moving of the trains. Neither works under the orders
ntrol of the other. Each, by entering into his contract of
ce, takes the risk of the negligence of the other in perform-
is service; and neither can maintain an action for an injury
d by such negligence against the corporation, their common
er."

ery test which the learned judge lays down for determining
uestion of fellow-servants applies fully and exactly to the
at bar: Common employer and paymaster; same place of
s, exposing one to injury from negligence of the other; same
of service; neither subject to other's control. Unless we
d Ryan as a departmental director, which, for reasons hereto-
ndicated, I think cannot be done, the cases are substantially
el. Of course, if so, that decision controls the case.
m aware that the Ross Case is a later expression of that court,
t is claimed overrules it. The opinion in that case contains
ference to this, does not purport to overrule it, and, with the

construction I have placed upon it above, is in entire with it.

One other case has been cited, that of *Feitzman v. I. R. Co.*,* recently tried in the United States circuit court northern district of Illinois. In that case, through the negligence of a switch conductor, an engineer of a switch-engine, in the control of another switch conductor, was injured, and the learned circuit judge in his charge to the jury ruled that the parties were not fellow-servants, and that the company was liable for the switch conductor's negligence. Unless the switch conductor can be considered as the superintendent of a department, within the scope of the Ross decision (and that doubtless is the view taken by the learned judge), it would seem that this case was directly in conflict with the Randall Case.

I do not know that I need add more, or that I can make the views any clearer. I have given this case a most careful consideration. I am fully aware of the direction of modern rulings on this subject, and the views expressed and the principles enunciated in the *Fall River* case may not be obviously and unquestionably correct. It is probable that ere long the rule of exemption laid down in *Randall* may be entirely overthrown. But if overthrown it should be by legislative action, and not by judicial decision. The true judicial walk is, as I conceive, *super antiquas vias*.

I think the motion for a new trial should be sustained.

Who are Fellow-servants.—Among the recent decisions concerning this question are the following:

In *Keys v. Penna. Co.*, 3 Atlantic Repr. 15, it was held that a switchman, an employee of a railroad company, who is crossing the tracks in the yard on his way to his work, is seen standing on a track in front of a approaching engine backing down the track, and is a moment afterwards run over and killed, the evidence discloses a case of contributory negligence on the part of the switchman, though the engineer running the engine is shown to have only the use of one eye, still they were fellow-laborers, and the company is liable.

In *Tissue v. Baltimore & Ohio R. Co.* (Penna., March, 1886), 2 Atlantic Repr. 596, it was held that an act done by the superintendent of a branch of the work of a railroad company, acting under the authority of the master of the road, is, so far as a subordinate employee is concerned, an act of the corporation itself, and cannot be attributed to a fellow-servant of such employee.

In *Neubar v. N. Y., L. E. & W. R. Co.* (New York, Dec. 1885), 1 Atlantic Repr. 125, plaintiff was injured while working on defendant's bridge as a carpenter. The negligence consisted in the manner of placing the girders along the bridge. At the suggestion of the foreman on that division, rollers were placed under the girders in transferring them to the higher portion of the bridge, and the beams fell on and injured plaintiff. The negligence claimed was that the structure should have been supported by ropes. There were plenty of these at hand. *Held*, that plaintiff's injury was due entirely to the carelessness of a co-servant who was at the time as his foreman, and that he was not entitled to recover.

* Oral charge to jury; not reported.

Brien v. Boston & Albany R. Co., 138 Mass. 387, the foreman of a gang of men employed by a railroad corporation in repairing its track ordered them to quit work at fifteen minutes before the usual hour, and a train, which was to carry them to a certain station without payment of wages, according to a monthly custom, to receive their wages. One of the men, while running along the track in order to get on the train, was injured by a hand-car operated by another gang of men in the service of the corporation. *Held*, that he was in the service of the corporation at the time he was injured, and was a fellow-servant with those whose negligence caused the injury.

Wigler v. Danbury, etc., R. Co., 52 Conn. 543, it was held that an employee of a railroad company on a train running over the track of another company, under a contract by which the former company furnished to the latter an engine, engineer, firemen, conductor, and brakemen to run the train at an agreed price per month, the latter company retaining absolute control over all trains on its road, is not a fellow-servant of an employee of the latter company, and it will be liable to him for an injury received in the operation of such train with a train of the latter company, caused by the negligence of its conductor.

To warn of Approach of Trains.—In an action for damages for an injury to an employee caused by negligence of his employer, it is proper on cross-examination of a witness to ask whether it was not the custom of the company, or of all companies, to have a foreman with the section men to warn of the approach of trains. *Pittsburgh, etc., R. Co. v. McGrath*, 102 Ill. 643 (Illinois, Nov. 1885).

Liability of Master for Injury where Servant acts outside Scope of Employment by placing Hand-car on Foreign Track.—Where a servant is employed to accomplish an end which is within the scope of his employment, while so engaged adopts means reasonably intended and directed to the accomplishment of that end, which result in injury to another, the master is answerable for the consequences, regardless of the motives which induced the adoption of the means, and this, too, even though the means employed are outside of his employment, and against the express orders of the master. Hence, where C., a foreman, returning with his crew and hand-car from work, encounters a train on the line of his employer's road, and thereupon directs the car to be transferred to the track of a parallel line operated by another company, which had been done before, but without the knowledge or consent of the latter company, and while proceeding on such track his car is negligently run against the car containing the section men of such road, whereby the latter is injured, C.'s employer is liable. *Pittsburgh, etc., R. Co. v. McGrath*, 102 Ind. 399.

Or by throwing Bundle off Train.—The defendant is owner of the cars for sleeping and parlor cars in use on the Boston & Albany R., under an agreement between it and that corporation. The plaintiff was at the time of the injury an employee of the railroad company, as track layer on a freight train, at work on the line of the road and in the exercise of due care. An express train was passing through the city of Newton, the porter of the defendant's cars threw out a package to a woman who did his duty, which struck the plaintiff and did the injury complained of. It was held that the act complained of was not within the scope of his employment, and it is wholly immaterial that he was at the moment riding in a car of the defendant, in which he was employed by it for other purposes. *Walton v. Cent. Sleeping Car Co.*, 139 Mass. 556.

On the night of June 20 plaintiff's jack was found dead near defendant's road east of Edna, and had evidently been killed by a passing engine on defendant's railroad. On the same day one McFarland had died at Ganado, Edna, who had no connection with the railroad. The coffin was made

at Edna and not finished until late at night. An engine and tender were lying on a side track at Edna, and the engine teered to and did convey the coffin to Ganado that night, as he had to go beyond there to get water in the morning. On this trip the jack was used. All engineers were ordered to lie up at night and not move without orders. The trip was made in direct violation of orders and against the engineer's consent, and the engineer was immediately discharged by defendant's order. *Held*, under these facts plaintiff could not recover damages from the railroad for the killing of his jack. *N. Y. & T. R. R. v. Southerland* (Texas, March, 1886), 6 Texas Law Rev. 179. *Allegheny, etc., R. Co. v. McLean*, 1 Am. & Eng. R. R. Cas. 464. *Carter v. Louisville, etc., R. Co.*, 8 *Ibid.* 347 and note; *Hennrich v. Car Co.*, 18 *Ib.* 379.

Low Bridge—Brakeman injured—Liability of Bridge Company.—If a bridge over a railroad track is built in a safe and substantial manner, and at a height above the tracks such that at the time it was built, to admit of the free use of the road, the mere fact that the bridge became dangerous because higher cars were brought over it by the railroad company, so that a brakeman required by his duty to get to the top of a car could not pass under the bridge without in some way coming in contact with it, and lying down, will not render those maintaining the bridge liable for the death of such brakeman who was knocked from the car and they had no notice of the change in the height of the cars.

A railroad is not a public highway in such sense as to render an obstruction thereto a public nuisance, for the maintenance of which one is wholly irrespective of the question whether he knew it to be a nuisance or not.

Where several such bridges were side by side and were well known to the deceased, the facts that when the train approached the bridges it was in full light; that the deceased and a fellow-brakeman were seated on top of the cars facing the bridges; that they passed all but one of the bridges in safety; that his companion passed all in safety, and the one by which he was struck was the last; that the men were not engaged in the performance of any duty but were sitting idly together, in full view of the danger, and nothing to distract their attention and nothing to do but to avoid it, will constitute such evidence of contributory negligence as will defeat recovery of damages for the death of deceased. *Stoneback v. Thomas* (Penn. 1886), 2 Cent. Repr. 604.

Insufficient Height of Bridge—Injury to Servant.—A complainant alleged that a railroad company alleged the construction and maintenance by the defendant of a highway bridge over its railroad track, of an insufficient height to permit brakemen to perform their labors, without great danger and hazard to the complainant, who had knowledge of the insufficient height of the bridge, and that it was unsafe for its brakemen to discharge their duties while passing under such bridge; that the plaintiff was ignorant of the fact that the bridge was so low, and that it was dangerous for him to attempt to perform his duties imposed on him, as a brakeman, while passing under the bridge; that while in the defendant's employ as brakeman, at his proper post of duty, he was struck by the bridge, while his train was passing under the bridge, and he was injured. *Held*, that a railroad company is required to construct and maintain its roadway and appendages and its overhead structures, in such a manner and condition that its employee or servant can perform all the duties required of him with reasonable safety. *Baltimore, etc., R. Co. v. Rowan* (Indiana, Nov. 1885), 1 Western Repr. 914.

An instruction that if a railroad company constructs a cover over the line of its railroad it should build it of sufficient height so that persons employed by the railroad company as brakemen, and who are

upon the top of freight trains in discharging their duty as brakemen, going through the bridge, may pass through without danger to their safety, *held*, in connection with other instructions, fully stating the F's (brakeman's) duty to observe due care, to be a proper statement of duty as to the company's duty. *Chicago & A. R. Co. v. Johnson* (Illinois, 1886), 4 N. E. Repr. 381.

Master and Servant—Negligence of Independent Contractor.—The plaintiff was frightened at a steam-shovel, and ran, throwing the plaintiff out of his carriage, who thereby received the injury complained of. The shovel was operated on the defendant's land, used to obtain gravel to ballast the road near the highway in which the plaintiff was travelling. The defendant's negligence tended to show that the shovel was operated and wholly controlled by M., an independent contractor, and his servants, although its use was contemplated when the contract was made; and the question being whether the defendant or M. was liable, the court charged in effect that the defendant's liability was coextensive with that of M., if it was part of the agreement that the shovel was to be used in doing the work. *Held*, error; that the work was so dangerous and the shovel not a nuisance, until it became such by negligence, the defendant was not liable, unless the relation of master and servant existed between it and those operating the shovel; unless it not only prevented the end but directed the means and methods; and that the inquiry was whether the defendant or M. was the principal or master in operating the shovel; if M. and it became a nuisance through his negligence, he alone was liable, although it was understood by the defendant, in making the contract, that the shovel was to be used. *Bailey v. Troy, etc., R. Co.*, 1 East. 28.

Master and Servant—Whether Engineer running Train for Railroad Company is a Contractor—Liability for Negligence—Case in Judgment.—A railroad company employed M., a contractor, to do certain work upon its tracks and paid him therefor a stipulated price, and furnished him a construction train and an engineer to run the same. The company prohibited the use of this train at a greater rate of speed than thirteen miles per hour, and required that it should be on a side-track fifteen minutes before the regular time for each of the company's trains. Subject to these regulations, the control, management, and direction of the construction train was given to M. The engineer was selected by the company, and it alone had the right to discharge him, though bound to do so upon the complaint of M., or to supply his place. The company paid the engineer's wages, but not the same to M., and deducted the amount thereof from the sum due M. for his work. A mule having been killed by the negligent running of the construction train, the owner sued the railroad company for the value of the mule. The defendant resisted the action on the ground that the train was run by its servant, but by M.'s. *Held*, that such engineer was the servant of the railroad company. *New Orleans, etc., R. Co. v. Norwood*, 62 Miss. 565.

Hire of Personal Property with Servant to manage—Rule in such cases.—The above decision is based upon the principle that where a person hires the personal property of another who furnishes a servant to manage the property, though the hirer acquires the right to superintend and direct the conduct of the servant, the latter continues to be the servant of the owner of the property, who is responsible for any negligence of the servant in the performance of his service for the hirer, even where the hirer only is interested in the service. *New Orleans, etc., R. Co. v. Norwood*, 62 Miss. 565.

Immediate Cause, what is—A Question of Fact.—Where a railroad car is run over on a track at an immoderate rate of speed, and a laborer employed on such track, who is near being run over, jumps to get out of the way, and inadvertently steps upon ice and slips and is run over, it cannot be said,

as a matter of law, that the improper speed at which the car was was not the proximate cause of the accident. *Crowley v. Burlington Co.*, 65 Iowa, 658.

An act is the proximate cause of an injury when the latter is and probable consequence of the negligence or wrongful act, with light of attending circumstances, should have been foreseen. What proximate cause of an injury is ordinarily a question for the jury, a question for science or legal knowledge. *Eames v. Texas & N. O. Texas*, 660.

Injury while riding on Hand-car.—A section boss on a railroad crew took a hand-car to go from Reed's mill to a switch about one mile east, where they would go from the main track upon a second track way to work. A passenger train which should have passed there an hour and a half before was behind time. It overtook, and running on the hand car, killed one of the section-men. The foreman did not know no reason to believe that the train had not passed and did not send a message to the telegraph office, which was one mile distant, to ascertain if a passenger train was coming. The deceased did not know of the whereabouts of the train, although he had the same opportunity of knowing as the foreman. There was no carelessness in the running of the train. The railroad company could not be required to respond in damages for the death of the deceased, as he voluntarily and without protest rode upon the hand-car. *Railway Co. v. Leech*, 41 Ohio St.

Co-servants—Defective Vision of Engineer.—B., an engineer employed by a railroad company, was going through the yards of the company at his work; a locomotive of the company was backing slowly on the tracks; it struck B. and killed him. Whether he was walking or stepped suddenly upon it and in the road of the approaching locomotive is not clearly shown. In an action against the company for damages the negligence of the company alleged to consist in placing the charge of an engineer, whose left eye was so badly diseased as to require the keeping of it bandaged, and whose right eye was defective in vision, to sympathetic causes, *held*, that plaintiff was properly nonsuited. *v. Pennsylvania R. Co.* (Pennsylvania, 1886), 3 East. Repr. 830.

WILLIAMS

v.

CLARK.

(*Advance Case, Massachusetts*, 1886.)

By a contract between plaintiff's grantor and the defendant company, the latter was to furnish the former, his heirs and assigns, two convenient crossings over its railroad, one of which was to be at grade. The place for the crossing was designated by plaintiff and the crossing was built, and was unobstructed by gates or bars for many years. The contract did not in terms provide that the crossing was to be unobstructed by gates and bars, but merely that it should be. *Held*, that the defendant was bound to keep the crossing unobstructed free from gates or bars.

Where a railroad company is bound to furnish the plaintiff with

over its railroad, if a change of grade is made in the railroad, the company is not liable for the expense of raising the approaches to the crossing, rendered necessary by the change in the railroad grade.

CONTRACT, against the receiver of the New York & New England R. Co., with counts in tort, for the interruption of a right of way over the railroad of said company. In the superior court judgment was ordered for the plaintiff, and the defendant appealed. The facts appear in the opinion.

W. C. Loring for defendant.

T. G. Kent and *G. B. Williams* for plaintiff.

DEVENS, J.—In 1853, Dan Hill, from whom the plaintiff derives title, conveyed land to the railroad company by a deed which provided that the grantee was to furnish Hill, his heirs and assigns, with two convenient crossings (the precise spots to be thereafter designated by Hill) over its railroad, one of which, FACTS. that now in question, was to be a crossing at grade. Soon after the date of the deed, Hill indicated the spot where this should be located, and a crossing was there built on its own land by the railroad company, adapted to the grade of the road as then fixed. It was not obstructed by gates or bars, either then or for many years thereafter; and it is on account of such obstruction, erected in 1884, that the plaintiff seeks in this action sufficient damages to establish his right to an unobstructed passage.

While, in terms, it was not provided that this crossing should be unobstructed by gates or bars, yet the facts that it was to be "convenient," and that the railroad company itself con- "CONVENIENT"
CROSSING. structed and for many years permitted the existence of such a one, sufficiently show that what it intended to grant was a free right of passage. No usage or circumstances such as are known where one grants a way or right of way over a field devoted to agricultural or other purposes, indicating that the right granted is to be subordinate to the rights of the grantor, or the use made by him of the premises, here exist. *Welch v. Wilcox*, 101 Mass. 162; *Under Ice Co. v. Cunningham*, 8 Allen, 139. That a crossing obstructed by gates or bars is far less convenient to those entitled to use it is fully conceded by the defendant's argument.

Unless the railroad company is released from its obligation by reason of the peculiar character of the business it conducts, or by the general laws, especially those imposing on it certain duties as to maintaining fences, the plaintiff has just ground of complaint for the obstruction. The defendant objects that, if a gate cannot be put at a private crossing, the railroad company cannot protect itself against such private crossing becoming *de facto* a public one; but since 1857 a public grade crossing can only be made upon the adjudication of the county commissioners that the public necessity requires, and since 1876 only, in addition to such adjudication,

by the consent of the railroad commissioners; and that if these statutes is destroyed if every owner of a private force the railroad to make it *de facto* public. That an open private way tends to become a public one, or those who maintain it to responsibility for its condition is the apparent invitation to travel thereon which it holds to be true; but a party entitled thereto is not, on that lose the benefit of the contract which his predecessor made.

The statutes, by the ample powers given to the public in regard to a "travelled place" in towns or cities provided carefully for protection to those who travel either on railroad, or on public or private ways connected therewith. St. c. 112, §§ 163-166. An extremely broad term has been used that every description of way might be included. Such a provision might make, without doubt, entirely different provision for a private way crossing a railroad from that agreed to by a railroad corporation and an individual, if they deemed it necessary for safety required it. Whether, if such use were much more convenient to an individual than that for which he had contracted, he would have a remedy therefor in damages, need not be considered. Even if the crossing here in question is to be considered a "travelled place," or tends to become one by the use made of it by the plaintiff, so that the railroad corporation may be compelled, or that there is reasonable ground to believe that it may be compelled, by the public authorities to erect and ring the bells of its locomotives, erect and maintain gates, station agents, or flag-men, etc., this cannot entitle the corporation itself to obstruct a free and open private crossing which has granted such a crossing.

The statute of 1846 (chapter 271) was in force when the act with Hill was made. By it all railroad corporations were required to fence their ways at such places as may "reasonably be required." The statute at present in existence imposes the duty on the owners of their railroads, omitting the words "reasonably required," to both require a highway or other public way to remain open, and each statute these fences are to be constructed "with gates, bars, gates, or openings" therein, so far as private ways are concerned; barriers to prevent the entrance of cattle thereon, provided where it is necessary or practicable to do so. St. c. 112, § 115. Because a railroad corporation may employ any of these three means to render a private crossing available, it may be inferred that, when it has lawfully agreed to employ one, it may of its own volition employ another. If it is found that public safety required a different use of the crossing, it should cease to exist as an unobstructed and open crossing, and the corporation could itself have invoked the action of the

ties. For these reasons we are of opinion that the plaintiff is entitled to nominal damages for the obstruction complained of.

The question remains by whom the expense of raising the approaches to the crossing, rendered necessary by the change in the grade, shall be borne. The defendant was required to make a crossing "entirely within the limits of the land herein conveyed" to it, which was "forever to be maintained" by it. The duty imposed on the defendant was carefully limited by words which do not include approaches to the crossing. If the contingency that there might be thereafter a change in the grade of the railroad, lawfully occurred to the contracting parties, it is reasonable to believe that the plaintiff himself should prepare his approaches thereto, with regard to that which he deemed most suitable in the use made by him of his premises. No authority was given to the railroad corporation to enter by its servants on any land of the plaintiff there to raise the grade thereof, or to perform any act therein. While the crossing was to be made "convenient," it was so within the limits stated. The fact that, by its workmen, the corporation actually constructed the approaches originally, without evidence upon the question who bore the expenses, is not important. The plaintiff is not, in our view, entitled to recover from the defendant the expenses of changing the grade of the approaches. Judgment for one dollar damages.

CHANGE OF
GRADE—EXPENSE OF
CHANGING APPROACHES.

McKIMBLE

v.

BOSTON AND MAINE R. Co.

(*Advance Case, Massachusetts. April 2, 1886.*)

took a train of the B. & M. Co., at B., having in his possession a ticket between B. and M. When the train reached C., where it was obliged to stop, being within 500 feet of a crossing of its tracks with those of another railroad, A. left the train, stepped upon a track on the westerly side of the train, and was instantly killed by a freight train. C. was not a station of the B. & M. Co. No tickets were sold to or from that point. The train was not called in the train. No provision was made on the westerly side of the track for passengers; but on the easterly side there was a small platform and a platform, maintained by the B. & M. corporation. They were adapted for the use of passengers, and were used by passengers to enter the train of the company, and also by men employed in its shops. No trains were advertised to stop at this point, and only stopped because so required.

by law. *Held*, that there was an inducement held out to passengers to leave the train at this point, and if the train had reached a point where the passengers might rightfully leave it, as it was certainly dangerous to do so on one side, and no means were provided to prevent passengers from leaving on the wrong side, and no direction was given them not to do so, it was a question for the jury whether reasonable care for the safety of passengers had been used by the railroad. Also *held*, that A. would still be a passenger, within the meaning of that word in the statute, if, by reason of the defendant's neglect of precaution it should have taken, A. left the car at a place where passengers were not expected to leave the train, and thereby lost his life.

In an action against a railroad company for negligently causing the death of a passenger, it is not necessary to prove that the deceased was not negligent, if he was a passenger, and his life was lost through the negligence of the defendant, or from negligence of its servants or agents.

Tort to recover damages of the defendant corporation for causing the death of Jeremiah McKimble, the plaintiff's intestate. At the trial in the superior court, before Mason, J., the following facts appeared:

Jeremiah McKimble took passage on a train of the defendant corporation, leaving Boston at 5 o'clock in the afternoon of January 10, 1883. He had in his possession a ticket issued by the defendant, good for five single passages between Boston and Malden, the ticket not being good to stop over on. The conductor, in collecting fares, had not reached the seat where McKimble sat, when the latter left the train, which did not stop at Malden, and was not advertised to stop there. The railroad of the defendant, as it leaves Boston, after crossing Charles River, crosses Miller's River on a draw-bridge, then Austin street in Charlestown, and approaches a grade crossing of the Fitchburg R. Co. Before passing this crossing of the Fitchburg railroad, the defendant, at the time of the injury to McKimble, was obliged by law to stop its trains within 500 feet of the crossing. The territory at this point was once covered by water, and over a part of it a pile structure has been built, and a part of it has been filled. Upon the westerly side of the principal tracks of the railroad the premises are occupied by the freight-yards and shops of the company. Miller's River passes between the yards and shops, and the defendant had no right to obstruct it in any manner except to cross it by a draw-bridge. No provision of any description is made for passengers upon the westerly side, and all the territory on that side, including the pile structures and the filled land, is dangerous and unsafe for passengers. Upon the eastern side of the tracks, immediately south of Austin street and the crossing of the Fitchburg R. Co., was a small building, and a platform extending around it, and nearly 700 feet southerly by the side of the track to Miller's River. The building and platform were maintained by the defendant, and there was evidence tending to show that they were adapted for the use of passengers, and were used by passengers, at

any rate, to enter trains of the defendant, and were also used by men employed by the defendant at its shops in the vicinity. No trains of the defendant were advertised to stop at the point, and its trains were only stopped there because so required by law; no tickets were sold to or from this point, and no fares were taken by the defendant for passages to and from this point; but if taken from persons entering or leaving the train at this point, they were fares always to advertised stopping places beyond. The name of this stopping place was never called in the trains. The plaintiff's intestate, as the train upon which he took passage was approaching this stopping place, left his seat, passed out of the car in which he sat, and left it, and the train, upon the westerly side of the tracks, where no provisions had been made for passengers, and he was almost immediately killed by a freight train.

The defendant requested the court to rule that the plaintiff's intestate, at the time of receiving the injuries, was not a passenger, because by voluntarily leaving the train in the manner in which he did at Charlestown, or Prison Point, as it is sometimes called, he ceased to be a passenger, within the meaning of chapter 112, § 212, Pub. St., and was no longer entitled to the rights and protection of a passenger; that the undertaking and duty of the defendant towards him was to carry him with due care between the points designated on his ticket; and at the terminal point, and only at that point, to provide safe means for him to leave the premises of the company, or, at most, only some point at which it advertised and definitely undertook to deliver passengers, and not elsewhere; that the defendant was not bound to provide passengers with means of leaving its trains there, or generally at points at which it had not advertised to stop, and for which it had not sold tickets. The court declined so to rule; but instructed the jury, among other things, that it was not conclusive that the deceased ceased to be a passenger because he left the train upon the side of the track on which no provision had been made to receive passengers, and upon which there was no inducement offered affirmatively by the defendant corporation for passengers to leave the train; that if the plaintiff showed that the deceased got off upon that side of the train in consequence of the negligence of the defendant corporation in omitting to do something which it was bound to do, then he retained his *status* as a passenger; that the obligation of the road, with reference to the matter of providing proper safeguards at this point, was to use reasonable care for the safety of its passengers; that if the deceased left the train in consequence of the negligence of the corporation, and came to his death by reason of the negligence of the corporation, the fact that he was at fault does not defeat his right. The jury found for the plaintiff, and the defendant alleged exceptions.

S. Lincoln for defendant.

Chas. G. Fall for plaintiff.

DEVENS, J.—The defendant contends that “the plaintiff forfeited his rights as a passenger by voluntarily leaving the train at Prison Point, without regard to the manner in which he left it;” that is, assuming that the conduct of the plaintiff’s intestate was in all other respects proper, the fact that he left the train there deprived him of his rights as a passenger. But Prison Point was not merely a place where the defendant was obliged by law to stop its trains; the eastern side of the track was a building and platform for the use of passengers, and used by them to enter the defendant’s trains, as well as by defendant’s workmen at their shops in the immediate vicinity. This certainly is some evidence of an intention to enter and leave the trains at this place, and, notwithstanding the instructions given the jury, there was at that place a station prepared for passengers to stop. This inquiry was of importance as bearing upon the second question in the case. This is the circumstance that the plaintiff’s intestate actually left the train upon the western side, where there was no station or platform for passengers.

It is further the contention of the defendants that “the plaintiff’s intestate forfeited his rights as a passenger by intentionally leaving the train upon the side upon which no provision was made for passengers.” This contention is in substance correct, if it can be held that there was any inducement or invitation to leave the train, it was simply on the eastern side, and that the duty of the defendant to protect its passengers was coextensive with the invitation, and cannot be further extended. The train had reached a point where the passengers might reasonably be expected to leave it, as it was clearly dangerous to do so, on one side, and means were provided to prevent passengers from leaving on the wrong side, and no direction was given not to do so, it was a question for a jury whether reasonable instructions for the safety of passengers had been used by the railroad. The instructions in this part of the case were full and correct, and would still be a passenger, within the meaning of that word in the statute, if, by reason of the defendant’s neglect of precautions which he should have taken, the plaintiff’s intestate left the train on the wrong side, and thereby lost his life.

The case at bar appears to be substantially determined by the former decision of this case. *McKimble v. Boston & Maine R. Co.*, 139 Mass. 542; s. c., 21 Am. & Eng. R. R. Cas. 213. It was observed that it was not necessary to prove that the plaintiff was not negligent, if he was a passenger, and his life was lost.

ough the negligence of the defendant, or from negligence of its
nts or agents. Pub. St. c. 112, § 212.
ceptions overruled.

PEAKE, Adm'r,

v.

BALTIMORE AND OHIO R. Co.

(*Advance Case, U. S. C. Ct., S. D. of Ohio. January, 1886.*)

ollision at a street-crossing having resulted in the death of the plain-
testate and his two horses, and the destruction of his wagon, it is held
a action under §§ 6134 and 6135 R. S. of Ohio, to recover damages for
ath of the intestate, is not barred by a former recovery, by the plaintiff
ther suit, of damages for the loss of the horses and wagon.

a collision with the defendant's train at a crossing, the intes-
nd his two horses were instantly killed, and his wagon was
ed. The administrator brought two suits in the State
; one for negligently killing the intestate, and the other for
rently destroying his property. There was a judgment in
ter case for \$450; afterwards a plea was filed, setting up
ecovery and its satisfaction in bar of this case, and there was
y stating the facts to which this demurrer was filed; and
quently the cause was removed to this court.

erse, Booth & Keating and Outhwaite & Lynn for plain-

H. Collins for defendant.

MOND, J.—It was by the statute 4 Edw. III. c. 7, which has
ree of common law with us, and through its enlarged con-
on by the courts, that injuries to personal property could be
sed, after the death of the owner, at the suit of the executor
nistrator. See Rev. St. Ohio, § 4975. That statute almost
ted, so far as it concerned personal property, SURVIVAL OF PERSONAL AC-
TIONS.
h perhaps not quite as fully as our modern stat-
ave done, the maxim that personal actions die with the per-
ut it left the maxim in all its force as to injuries to the per-
ntil quite recent times. In this condition of the law, and
to our own modern statutes giving a remedy after death
for injuries purely personal, there was a struggle, through
rious forms of action, to redress these latter injuries, notwith-
ag the obnoxious maxim, by bringing some action sounding in

contract rather than tort; and, on the other hand, certain upon contracts, but sounding in damages,—as, for *assumpsit*,—were sought to be excluded from the common-law advantage of survival for all actions upon contracts. The abolition of forms of action has increased the complication of the subject; but everywhere traces of the influence of the old terminations of the old special pleadings can yet be found, and the distinctions between actions *ex contractu* and *ex delicto*, like the distinction between law and equity, so inhere in the fibre of our law that it seems impossible to be rid of them. Schouler, *Adm'r*, 284; 1 Williams, *Ex'rs* (4th Amer. Ed.), 664, 669 *et seq.*; Saund. 216, note; Cooley, *Torts*, 262; 2 *Add. Torts*, 216; Broom, *Leg. Max.* (7th Ed.) 904-916; *Twycross v. Gray*, 10 P. Div. 40, 45; *Kirk v. Todd*, 21 Ch. Div. 484, 488; *Midland R. Co.*, 19 C. B. (N. S.) 213; *Bradshaw v. Lancashire & Yorkshire R. Co.*, 10 C. P. 189; *Blake v. Midland R. Co.*, 18 *Adol. & S.* 93.

There is in this case, since there is no relation of passenger and carrier or other contract between the parties, no element of contract, but a pure tort; unless, if necessity required, the principles of contract law might be invoked,—as in the case of the parson, for the duties mentioned in *Saunders*,—to raise a contract by reason of the duty to be performed by this railroad company in so far as it is that every person crossing its track should be safe from the consequences of this obligation or duty arising as a consideration for the company of operating a railroad at all. But, happily, we do not need to resort to such niceties to save a manifest right denied by the maxim which never had any sense in it, after the law, having advanced beyond the stage which gave all a man's property to the first taker, when he was dead, allowed wills to be made, and administrators to be appointed to transmit his property to his heirs or of kin, when his debts should be paid. The early recognition of a chose in action as property capable of transmission was a great advance more than the acknowledgment of the survival of a right of action, but this is not strictly comprehensible, for the reason that a chose in action has no life, and cannot die, as the maxim says. Therefore, discarding the fictions of which the law is so full, it may be truly said that when a man dies the law transfers his property and vests the subsequent ownership in whomever it pleases, according to its wisdom. Being dead, a man can no longer be a litigant in court, and the law therefore appoints another one to act in his stead and exercise the power he had in his lifetime in his injuries, be they what they may, with such limitations as the wisdom may impose. We now have, because of rules that have become familiar, only a faint notion of the latitude that the law may take in giving directions as to what shall be done with a man's property, and how the injuries—I mean in the

—he has sustained may be redressed by others appointed to redress them; these two things being in the end only one,—the distribution of his property, namely: for that compensation due as damages for injuries sustained either to person or property, though in the hands of an adversary who denies the dead man's claim to it, is, after that controversy is settled, the amount ascertained and satisfaction made, as much tangible property distributed according to his will or according to the directions of the law in lieu of it, as any other.

Now, for a very long time,—indeed, so long that we are apt to forget that it is all by legislative direction,—pursuing the course of nature, and following the indications of human sentiment, the law has permitted the dead man to appoint the persons to take his place, and those who are to take his place as litigants and represent him in that behalf; and, in default of a will to do that, selects the nearest to him in affection as the takers, and appoints some to represent him in litigation. Quite uniformly, everywhere, the law recognizes the claim of creditors to be first paid, and, after that the widow and children, and then the next of kin, should have the surplus. Nearly always the executor or administrator must sue or be sued, no matter who takes the proceeds; and the law by a fiction has treated this right of the personal representative as a thing transmitted by the dead man, in the sense that, by a similar fiction, the tangible property is transmitted; but we must not allow this fiction to mislead us in construing statutes like these. It may be that if, when the decedent died, he had a right to sue, already subsisting and accrued, there was some basis for treating this as transmitted by him to his executor or administrator; although, as a matter of fact, as the language of the statute in England and all subsequent statutes shows, it is rather the creation of the representative of a new right to sue. But when—as in the case of instantaneous death (if there be such a thing possible), in the case of death longer delayed, where the *gravamen* of the action is the injury arising out of the death solely, and not out of the continuous suffering—a suit is directed by law, which the decedent continuously to his death never had any right to bring, the fiction of transmission of the cause of action appears more distinctly, and the creation of a new cause of action becomes more marked. So important as this really is, it has a technical bearing which we must not overlook in cases like this, as we shall presently see.

Again, when the law in recent times took another step forward, during Edward's reign it had done, and determined that it would rather show the absurdity of offering a premium to crush a man to death than crush him less severely, it departed from the original principle of first satisfying creditors out of one's effects, and, as to that class of assets or property, followed an analogous modern principle of insurance of lives, and gave the proceeds directly to the

widow or next of kin, to the exclusion of creditors. Not State was this done, but generally. The reason of the plain, in view of the law as it stood under the old statute of Edward. There even purely personal injuries could be recovered *aliunde* any contract relation of the parties, if it were appear that, as a direct and proximate cause of the injury personal property of the decedent had been diminished; notwithstanding death ensued. The statute of Edward gave right of action in such a case, and it was treated as an injury to the property, and not the person; transmitted to the administrator notwithstanding the death; and the assets for satisfaction of creditors and distribution to the next of kin being lessened the administrator could sue as for all other assets.

But as to that pain and suffering which does not affect the property to diminish it, or lessen the assets in the hands of the administrator, and as to the loss of a life, in which creditors have a remote if any interest, concerning which injuries the next of kin can only sue if he lived, and not at all if he died, the legislature, in its wisdom, concluded that the claims of creditors were not to be paid, and distributed the proceeds to the widow and children of the next of kin. It is true the administrator sues, though the next of kin can under some circumstances, also sue directly; but it is not the creation of a new cause of action, and not one transmitted to the next of kin. This is shown by the fact that it proceeds mostly on the ground of compensating the next of kin for their loss, and not the administrator by increasing his estate for administration. The creditors do not take the property, but the relatives shall have the other, and this is the theory of legislation. It must be admitted, however, that there is a good deal of obscurity about the legislation, and it is difficult to say whether it proceeds on the one theory or the other. For it has commingled injuries which might have been redressed under the old statute of Edward, and possibly some that have been redressed as being a breach of a contract, even though that statute, and belonging to the general estate for administration, with those that certainly could never have found redress except under the new acts which divert the proceeds from the general estate. It may be that the assets of the estate proper for the benefit of creditors have been somewhat curtailed by this procedure, but the right of the widow or children of next of kin has been lessened much more than the extent of that curtailment. The statutes of the States, particularly those of Ohio, do not make it material to enquire whether it is for the pain and suffering of the decedent, or for that of those for whom the administrator sues, for the latter recovers; not, at least, as the question is here presented. In either case the money belongs to them, and not to the administrator *qua* administrator for the ordinary purposes of administration of assets. He is not the general trustee for the estate in

e, but a special trustee for the beneficiaries designated by the legislation, be they whom they may.

his analysis of the sources of the administrator's power to sue
comparison of the objects sought to be secured by the legisla-
old and new, authorizing him to sue, are necessary

a proper understanding and application of the doc- RES ADJUDICATA

e of *res adjudicata* invoked by this demurrer. There is much
e in the position that when one comes to sue for damages for a
icular trespass or tort of any kind, he should, in one suit, de-
d and show all his damage, whether to person or property; and
whether he sues in his own behalf or that of another. If he
for an injury to himself, this could be readily done, for the re-
ry belongs to him, and it would seem immaterial whether one
is for damage to property and another for damage to the per-

So, too, if Lord Campbell's act, and those of which it is the
otype, had, like that of Edward, merely given the administra-
the right to sue, the recovery to go, like other assets, into the
e *qua* estate, it is quite difficult to see why the whole damage
oth property and person should not be included in one recovery,
why any tort-feasor should be afflicted with two suits in such a

Surely, the fact that the right to sue for injuries to property
for certain injuries to the person affecting the property injuri-
y, was given in Edward's reign, and that the right to sue for
ries purely personal and not affecting the property was given
in the reign of Victoria, should make no difference in that
rd. Both are equally the creatures of statute; and if one
e the creature of the common law and the other of a statute,
e an old and the other a newly-created cause of action,—there
be no difference in the principle which would forbid two suits
the same tort. Nor does it seem material, in such case,
ther the deceased had a cause of action before he died, which
been transmitted by operation of law to his successor, or
ther the latter is the first possessor of the right to sue;
ther the *gravamen* of the action be the antecedent pain
suffering, or that which is caused simultaneously with death;
ther death be instantaneous, if there be such a thing possible,
nger delayed,—for once abolish the fiction that the cause of
on dies with the person injured, and the whole matter of re-
s is open at large to the legislature. It may consider whether
damages due shall go into the general assets of the estate,
eby enlarging the fund for payment of debts, and, after this,
distribution according to will or the statutes of descent and
ribution, or whether it shall go to others specially pointed out
he legislation. And here, again, it seems to be a somewhat
necessary refinement to consider the question whether the legis-
n is based on the idea of redressing a wrong done to the de-
ed, or to the statutory beneficiaries,—whether it is his loss or

theirs which is compensated by the recovery,—for the leg in either case, has the power to abrogate the old law and the wrong. But, reasonably, as the statutes are drawn, it seem to be not his suffering, but theirs, which is the work of the action; and, in tracing back the established rule, no cause of action will lie to a third person for any injury suffered by the death of another, it will be found that it was never factory to the courts, since no very sound reason was ever for it. *Hall v. Steamboat Co.*, *Thomp. Carr.* 205; *Nash v. C. R. Co. v. Prince*, 2 *Heisk.* 580; 2 *Thomp. Neg.* 1272.

But with plenary power to redress both the wrong to the deceased, and that resulting to his dependents, the legislature has, without any care for the distinction, has given a broad remedy for redress; and the new legislation, with that which previously existed, now furnishes a complete remedy for every one. Apart from these refinements, it is only necessary to consider how long ago the damage for injury to property, either direct or through injury to the person which resulted in a diminution of property, was placed by the legislature in the same category as other property, and brought within the policy of the law. It determines that all property, with specific exemptions, shall primarily a fund to pay the debts of the decedent, and any surplus shall belong to the persons designated in the statute of descents and distributions. But as to damage for personal injury, following a policy which determines that in such cases the creditors are not equitably interested, the new legislation provides that the proceeds directly to persons named in the statute,—the statute of distribution for this particular fund. Now, it is manifest that two suits are required to keep these two funds apart. If one suit were brought, there would be no way to apportion a verdict *in solido*, showing how much was for injury to property, and how much for injury to the person.

SAME—TWO
SUITS NECESSARY.

Since the statute makes no provision for such apportionment, as it might have done. Perhaps it would have been just to defendants, and more economical to all concerned, to require one suit, and make provision to have the recovery apportioned by the jury, by the court, by the administrator, or otherwise. The legislature has not thought so, and *ex necessitate* there must be two suits. Nominally, the parties are the same, and in the same sense the cause of action and the issues are the same; but in a technical sense none of these conditions exist, as shown by the foregoing reference to the sources of the two suits, and their characteristics, respectively, and the case does not at all conform within the familiar requirements of the principle of *res adjudicata*. The law, in its own wisdom, and in pursuance of its own policy, splits the cause of action. The administrator is the trustee of two distinct funds, for two distinct purposes, and

ly, sues in two distinct capacities, as much as if he represented decedents, or as if the legislature had appointed some other to bring the personal injury suit rather than himself. This is fairer under the Ohio statute, as amended, than some others, and plainer in this case than it might be in some others, where the alleged injury to the property or general assets was not direct and patent as it is here. Rev. St. Ohio, 6135; 77 Laws, p. 207 (Act April 30, 1880); *Steel v. Kurtz*, 28 Ohio St. 191. Cases elsewhere support this judgment. In England it has been held, not only that an administrator may bring two suits, as suggested he must, but also that one who has AUTHORITIES. been injured both in property and person may, even while living, bring two suits, but not without substantial protest in the latter. *Leggott v. Great Northern R. Co.*, 1 Q. B. Div. 599; *Woods v. Humphrey*, 10 App. Cas. —; s. c., 11 Q. B. Div. 712; *Shaw v. Lancashire & Y. R.*, *supra*; *Blake v. Midland R. Co.*, *supra*; s. c., 83 E. C. L. 93; *Needham v. Grand Trunk R. Co.*, 38 Vt. 294.

The first of these cases is directly in point, only the case at bar is plainly within its ruling, and it is the only case disclosed by the diligence of counsel or my own which is so; but the others are in the reasoning of that case, and I have endeavored to show the soundness of the judgment; and that, whatever may be said of the timing, while one is living, two suits for the same tort to person and property, there can be no objection, under existing law, to two suits by his administrator; indeed, there must essentially be two suits for the reasons I have stated, if for no other. *Murrer overruled.*

LONG ISLAND R. Co.

v.

GREANY.

(*Advance Case, New York. March 7, 1886.*)

negative testimony of passengers upon the train which caused the accident, which is the basis of the action, to show that the statutory signals were not given, is admissible, its weight being for the jury. A person approaching a railroad crossing on a highway is bound to make every reasonable effort to see an approaching train, he is not, as a matter of law, bound to see it; and the question whether he has used due care is for the jury.

It is error to grant a nonsuit where, by any allowable deduction of facts proved, a cause of action may be sustained by the plaintiff; not be granted because of the contributory negligence of the plaintiff, if such negligence is conclusively established by evidence which leaves no room for inference or fact for the jury.

APPEAL from a judgment of the Superior Court at Term, in the Second Department, affirming a judgment of the court in an action for damages for personal injuries.

Hinsdale & Sprague for appellant.

John Fleming for respondent.

DANFORTH, J.—The appellant concedes that there was no evidence on which the jury might find negligence upon its part. It tends:

1. That certain negative evidence from persons who were present affirmatively appear to have been looking, watching, or listening for the ringing of a bell or sounding of a whistle, was not received, to prove that those signals were not given.

2. That the plaintiff should have been nonsuited, on the ground of her contributory negligence.

As to the first: it is apparent that the best evidence of negligence in dispute would be the testimony of those persons who were present on particular occasion in question had the custody of the train. WITNESSES—PASSENGERS ON TRAIN. agement of the bell or whistle. They were, in the employ of the defendant; themselves interested in the fact that the proper signals were given by the defendant's agents, and the law does not require the adverse party to prove the case in the hands of persons having such relations to the defendant's action. Besides those persons, all others must give evidence of negligence in character.

One person might be watching the bell, looking at it, or listening for its sound; the value of his testimony would depend upon his nearness to the machine, the accuracy of his sense of sight, hearing, the existence or force or direction of the wind, and other causes.

Another person might be neither looking nor listening, but his position be such, and the circumstances about them so, that his testimony would be of equal or greater persuasiveness than that of the other. A jury must ascertain. An appellate court cannot say that the testimony of either should be received. Nor should a trial judge be required to determine its weight. The fact which it did or did not ascertain, if it has any legal effect.

No error, therefore, was committed in allowing the plaintiff's K., T., and R. to testify. They were passengers upon the train causing the injury; were in such position that it would be impossible for them to hear the signal if it had been given.

There was also abundant evidence from persons whose

directed to the train, to justify a finding that the statutory
 als were not given, and the whole was submitted
 e jury not only in a manner to which no excep- OTHER EVIDENCE
 —SUBMISSION TO
 JURY.
 was taken, but upon this point in the very lan-
 e suggested by the learned counsel for the defendant, adapted
 e occasion from *Culhane v. N. Y. Cent. & H. R. R. Co.*, 60
 . 133, upon which without proper foundation he then relied
 now cites. It cannot be so extended as to justify the exclusion
 idence.

s to the second point: it would have been error for the court
 ant the nonsuit if, by any allowable deduction from the facts
 ed, a cause of action might be sustained by the NONSUIT.
 tiff; and when such ruling has been made by reason of the
 ibutory negligence of the person injured, it appeared that
 negligence was conclusively established by evidence which
 nothing either of inference or of fact in doubt or to be settled
 jury. *Masoth v. Del. & H. C. Co.*, 64 N. Y. 529.

Kellogg v. N. Y. Cent. & H. R. R. Co., 79 N. Y. 73, there
 under review a nonsuit directed upon this ground by the
 eral Term, and we readily granted a new trial upon the appli-
 n of principles then declared to have been frequently laid
 n, and which must now govern. In that case the only negli-
 e of the defendant was the omission to give a signal
 e approaching train; the plaintiff came upon the CONTRIBUTORY
 NEGLIGENCE.
 ing and was struck; a moment before he was

looking to the north and it was claimed that he ought to have
 ed also toward the south, and that if he had he would have es-
 ed harm; and it was also claimed that if he had listened he
 d have heard the approaching train. Referring to the situa-
 of the man and his surroundings, the court, Earl, J., says:
 ither, under such circumstances, by the exercise DUTY OF TRA-
 VELLER TO SEE
 APPROACHING
 TRAIN.
 dinary prudence, he did or could have heard was
 estion upon all the facts proved, for the jury. It

questionably true that the deceased was bound to exercise his
 to avoid danger at the crossing. He was not bound to the
 est diligence which he could have exercised in that way; but
 as bound to exercise such care as a prudent man approaching
 a place would ordinarily exercise for the protection of his
 Did he exercise such care? Or, in other words, was there
 ntire absence of evidence that he did? . . . We cannot say
 at that particular time he should have looked toward the south.
 as for the jury to determine whether he exercised that care
 h the law required of him. He could probably have avoided
 ccident by stopping before he passed upon the track. But
 is a degree of care not usual even with very prudent persons.
 s not been decided by the courts of this State that a person

approaching a railroad is bound as matter of law to stop, to avoid the imputation of negligence."

And referring to evidence as to how an approaching train could be seen from various points, the learned judge says: "Such evidence is frequently very reliable and satisfactory. But it is not necessarily conclusive. Such experiments are made when the witnesses are calm and their whole minds, free from any distractions, are intent upon the matter in hand. They cannot be made under the precise circumstances which attended the transaction to be investigated."

And to the same effect among recent cases is *Shaw v. Jewett*, 86 N. Y. 617, where, in answer to the claim that the trial judge erred in refusing to charge the jury "that if they believed that the plaintiff could have seen the train at distance enough from the track to have stopped his horse before reaching the track, his failure to see the train was negligence on his part and he was not entitled to recover."

This court held there was no error, saying: "That is not the rule. The plaintiff is not bound to see; he is bound to make all reasonable effort to see that a careful prudent man would make in like circumstances. He is not to provide against any certain result. He is to make an effort for a result that will give safety; such effort as caution, care, and prudence will dictate."

I know of no exception to the doctrine that where there is any direct evidence, or inferential, of care or caution on the part of the person injured, the question whether it was in compliance with that rule is for the jury.

In the case before us the accident happened on the 17th of August, 1882, at about 5 o'clock in the afternoon, at Richmond Hill, where the defendant had a station, and by which passed two of its tracks running east and west, intersecting a highway running north and south. The station was at this point and on the south side of the track. The plaintiff lived on the north side of the railroad and, at the time in question, was going along the highway to a store situated on the south side of the tracks. As she came to the tracks to cross the railroad, she saw a train coming from the west on the southerly track; it stopped at the station to let off passengers, and its cars covered the highway, leaving no room for her to cross. She stood still waiting about five minutes for the train to move ahead, but when she reached the track the train was still standing there and she stopped just as it started. She "went to walk across too."

She says: "As I came up to the track I stood and looked both ways and along the track and saw no engine" other than that of the train from the west. She took a step or two and just as she did she saw a train coming from the east on the north track, but

SAME—QUESTION
FOR JURY.

so close by that she could not make her escape. This occurred in what seemed to her not more than a few seconds after she had looked up and down the track.

On cross-examination by the defendant's counsel, she says: "When I stepped on the first track, I looked both ways and could see nothing, and but a few seconds after that I was struck. I could see no engine looking either way. The train going west had not then left the station." She says: "It was just in the motion of moving ahead at the time I took a step or two; then I stopped on the north track just by the side of the track."

She was not between the rails, but stood by the side of the rail, looking at the train, still at the crossing.

Asked by the defendant's counsel: "Q. If you had stepped up by the side of that track and looked up the road, you would have seen the train, wouldn't you?"

She says: "I did look up and saw it too. It was so close by me that I could not possibly make my escape. If I had looked earlier I would have seen it, but I did not think there was any need of my looking more than once, and I did not think there was any other train due at that time. I had looked a few seconds before and then went right on. When I looked I could see about a quarter of a mile. I did not see any train, and then I walked on towards the track, and the train was right upon me before I noticed it."

At this time the engine at the depot was blowing off steam, and she heard no bell or whistle from the train coming from the east.

According to the defendant's time-table these trains should not have met or passed each other at this station, but the train going east was behind time. The engineer in charge of the train going west first saw the plaintiff when 600 feet distant.

Can it be said under these circumstances that she was bound as matter of law to see the incoming train? Was it not rather for the jury to say whether or not she had made the effort which a prudent person would make in like circumstances? I think it was for the jury; for it cannot be said to be impossible for a reasonable person to conclude that the accident was caused by the negligent running of the defendant's train, and not by the omission of a duty or reasonable care on the part of the plaintiff to avoid the collision. The train was unexpected; it was running, as the jury might find, at a dangerous rate of speed, giving no signals of its approach, while the escape of steam and the noise made by the other engine might distract and to some extent divert the attention of the plaintiff, who nevertheless was not heedless, but looked in both directions along the track. Whether she looked exactly at the right moment or in each direction in proper succession or from the place most likely to afford information cannot be determined as matter of law; and whether, upon the whole and in view

are required to come to a full stop before passing a crossing with another railroad at grade, a traveller on a street which crosses a railroad near such a railroad crossing has the right to presume that those in charge of an approaching train will comply with the law.

Whether under conflicting evidence as to the giving of proper signals; whether it was the duty of the defendant company to maintain a flagman at street crossing, where the accident in question occurred; and whether the person killed was guilty of contributory negligence, are questions for the jury.

Where the person killed was the head of a family, the evidence may take a wide range to give the jury the fullest view into the family circumstances, in order to determine the extent of their pecuniary loss.

A verdict for \$5000, one third to the widow and two thirds to three minor children, is not excessive. *Staal v. Grand Rapids & I. R. Co.*, 23 N. W. Rep. 795.

As to the Right of Person on Highway to presume that Signals will be Given.—See *Loucks v. Chicago, etc., R. Co.*, 19 Am. & Eng. R. R. Cas. 305; *Henze v. St. Louis, etc., R. Co.*, 2 *Ibid.* 212; *Penna. R. Co. v. Righter*, *Ibid.* 220.

Same:—Action for Injuries resulting from Plaintiff's Horse becoming frightened at Cars which had run off Track near Crossing—Contributory Negligence—Interest not allowable on Damages found by Jury from Date of Accident—Practice.—On a certain Sunday night two flat cars belonging to the defendant company ran off the track near a highway crossing and were left there, the defendant's servants being unable to get them back on the track. The plaintiff, a farmer residing near, although he had been informed of the accident, undertook to pass the cars in driving over the crossing the following morning, when his horse became frightened and ran away, thereby causing the injuries for which action was brought. *Held*, that the plaintiff was guilty of contributory negligence as he might have avoided the danger. *Forks Township v. King*, 3 *Norris*, 230; *Wilson v. Charleston*, 8 *Allen*, 137; *Centralia v. Krouse*, 64 *Ill.*, 19; *Butterfield v. Forester*, 11 *East*, 60; *Durkin v. Troy*, 61 *Barb.* 437; that the company was entitled to a reasonable time to remove the cars; that evidence of the failure of the company to remove the cars until several days after the accident is inadmissible; that evidence of the defective condition of the public road approaching the crossing is inadmissible; that the question of punitive damages was improperly left to the jury, there being no evidence warranting such damages; that it was error to instruct the jury to allow interest on the damages which they might award from the date of the accident to that of the verdict (*Wier v. Co. of Allegheny*, 14 *Norris*, 413); that the rule for determining proximate cause is, that the injury must be the natural and probable consequence of the negligence, such a consequence as under the surrounding circumstances of the case might and ought to have been foreseen by the wrongdoer as likely to flow from his act (*Railroad Co. v. Kerr*, 12 *P. F. S.* 353; *Railroad Co. v. Hope*, 30 *P. F. S.* 372; *Hoag v. Railroad Co.*, 4 *Norris*, 293); and that, under all of the evidence, the court should have directed a verdict for the defendant. *Pittsburgh & S. R. Co. v. Taylor*, 104 *Pa. St.* 306.

Same—Contributory Negligence.—One who, in approaching a railroad crossing, hears the whistle of an approaching train, but does not know the direction it is running, and is unable to see the track in one direction, is negligent if he attempts to cross without the exercise of sufficient care to determine that the train is not upon the part of the track concealed from his view, within a distance which would deter a man of ordinary prudence from attempting to cross the track. (*Schaefer v. Chicago, M. & St. P. R. Co.*, 62 *Iowa*, 624; *s. c.*, *Haines v. Illinois Cent. R. Co.*, 41 *Iowa*, 227; *Benon v. Central R. of Iowa*, 42 *Iowa*, 192.)

The court is authorized to determine what conclusions of fact may be lawfully inferred from facts proved, and in ruling upon a motion for a verdict must of necessity do so. It cannot imagine what other facts the jury could or might infer from the facts proved. *Griffin v. Chicago, R. I. & P. R. Co.* (Iowa, April, 1886), 27 N. W. Rep. 792.

The plaintiff, who was familiar with the movement of trains at the street crossing where the accident in question occurred, stopped to permit a switch-engine with a train of freight-cars to pass. The train stopped immediately after passing the crossing, and began to back, the plaintiff attempting at the same time to cross the track when the collision occurred. *Held*, that the plaintiff was guilty of contributory negligence and is not entitled to recover. *Kennedy v. Chicago & N. W. R. Co.* (Iowa, April, 1886), 27 N. W. Rep. 748.

Same—Negligence as a Matter of Law—Burden of Proof.—A., while driving in a one-horse phaeton and crossing the track of the Pa. R. Co. at a public crossing, was struck by an express train and killed. His children brought suit against the company to recover damages. The carriage road at this point approached the railroad at an acute angle, and the space between the two was so obstructed by trees and corn that, according to the plaintiff's evidence, a traveller approaching the railroad as A. did could not see the track in the direction from which the engine came until he was within ten yards of it, and then for only fifty yards from the crossing. The train was moving about forty miles an hour, and it did not appear that any signal of its approach was given. Nor was there any evidence as to whether A. stopped, looked and listened before attempting to cross. The court below granted a compulsory nonsuit, on the ground that the evidence showed such contributory negligence on A.'s part as to preclude any recovery for his death.

Held—(1) That the court was not justified, under the evidence, in saying as a matter of law that A. was negligent; and that the refusal to take the nonsuit was, therefore, error.

(2) That where a person is killed at a railroad crossing and there is no evidence whether he stopped, looked and listened or not, the law presumes that he did. This is a presumption of fact and may be rebutted. *Schum v. Penna. R. Co.*, 107 Pa. St. 8.

Same—Question of Negligence for Jury—Negative Testimony—Nonsuit.—Whether the ringing of a locomotive bell, without blowing the whistle, is a sufficient warning of the approach of a train to a highway crossing depends on the circumstances of the particular case, of which generally in actions for negligence it is for the jury to judge.

In rural districts, in case of trains running at a high rate of speed over public crossings, there is no proper substitute for the steam-whistle as a warning of approach, and in certain cases failure to blow the whistle may be negligence *per se*.

The testimony of a witness, who was near the crossing, and, for a particular reason which he stated, was listening for a signal, but heard none, is of a higher grade than mere negative testimony (*Kelly v. Railroad Co.*, 6 Am. & Eng. R. R. Cas. 95), and it should have been submitted, in connection with the negative testimony of other witnesses, to the jury.

In an action against a railroad company to recover damages for the killing of the plaintiff's son, twelve years of age, by a train running into a wagon which he was driving at a public road-crossing, it appeared from the plaintiff's evidence that the locomotive bell had been rung about half a mile from the crossing, and that the whistle was blown immediately before the collision occurred. Several witnesses who were in the neighborhood testified that they heard no bell or whistle prior to the whistle which was immediately followed by the accident; and one witness testified that being

near the crossing with a skittish horse, he was listening for train warnings, but heard none. The entry of a nonsuit by the court is *held* to have been error. *Longenecker v. Pa. R. Co.*, 105 Pa. St. 328.

The plaintiff's husband was killed by an engine at a street crossing on the defendant company's road. The accident occurred in the night-time after the flag-man had left the crossing, and there was a conflict of evidence as to whether the bell was rung or the whistle blown. The judgment of the court below on a verdict for the plaintiff is sustained.

Whether the ringing of a locomotive bell, without blowing the whistle in time to avoid danger, is a sufficient warning of the approach of a train to a public crossing depends on the circumstances, of which generally, in actions for negligence, it is for the jury to judge. *Pennsylvania R. Co. v. Coon* (Penna., Jan. 1886), 2 Cent. Rep. 328.

Same—Insufficient Evidence to sustain Verdict—Negative Testimony.—The killing of the plaintiff's intestate at a highway crossing by a train running ten miles per hour, giving the usual signals, is not of itself sufficient to sustain a verdict against the defendant company.

Where it does not appear that a witness would probably have heard the bell or whistle of a train approaching a public crossing had they been sounded, his testimony that he did not hear either before the train reached the crossing is of no value whatever, and has no tendency to prove that they were not sounded. *Harris v. Minneapolis & St. L. R. Co.*, 38 Minn. 459.

Same—Sufficiency of Complaint.—A complaint against a railroad company for killing cattle upon a highway crossing, by reason of negligent failure to sound the whistle and ring the bell, as the statute requires, without any negligence of the plaintiff, is good. *Cincinnati, etc., R. Co. v. Hiltzhauser*, 99 Ind. 486.

Same—Defect in Highway—Approach to Bridge.—A railroad corporation is liable for an injury caused by a defect in a highway which is an approach of a bridge over its railroad, although the defect is outside of the approach as it existed when the bridge was originally constructed, but within the approach as widened since the construction of the railroad. *Carter v. Boston & P. R. Co.*, 189 Mass. 525.

Same—Speed of Train within Limits of Town—Contributory Negligence.—§ 1047 of the Mississippi Code of 1880 does not create an absolute and unconditional liability by a railroad company for all damage done by the running of a train more than six miles an hour within the limits of a town. Although the statute may have been violated, the plaintiff cannot recover if he contributed proximately to his own misfortune. *Vicksburg & M. R. Co. v. McGowan*, 62 Miss. 682.

Running Train parallel with Highway—Frightening Horses—Negligence.—A railroad company is not responsible to travellers on a highway for the consequences of noise, vibration, or smoke, caused by the prudent running of trains on its road adjoining such highway. *Favor v. Boston & L. R. Co.*, 114 Mass. 350. The right to fire up an engine at any particular place depends upon the character of the place, and not whether there happens to be a person near at the time. *Lamb v. Old Colony R. Co.*, 2 N. E. Rep. (Mass.) 982.

As to the Relative Weight of Affirmative and Negative Evidence as to sounding Signal.—See *Chicago, etc., R. Co. v. Robinson*, 18 Am. & Eng. R. R. Cas. 620, and note; *Ibid.*, 20 Am. & Eng. R. R. Cas. 396, and note.

COMMONWEALTH

v.

RICHMOND and PETERSBURG R. Co.

(Advance Case Virginia. June, 1885.)

The charter of the R. & P. R. Co. provides that "all machines, vehicles, and carriages purchased with the funds of the company for their works constructed under the authority of this act, and all property shall accrue from the same, shall be vested in the respective shares of the company forever, in proportion to their respective shares; and shall be deemed personal estate, and shall be exempt from any property or tax whatever." *Held—*

1. All the property and profits of the company, and also the stock of the respective shareholders, are exempt from taxation, county, and municipal.

2. The power of exemption, as well as the power of taxation, is a vital element of sovereignty; it can only be surrendered by the consent of the legislative intention so to do.

3. The exemption from taxation constitutes a contract which is binding by the Federal Constitution, and cannot be repealed by the State without the right to do so was reserved in the charter or has been subsequently.

4. The State has not acquired the right to repeal, nor has it attempted to repeal, by any of the legislative acts since its adoption. In opinion, this company's charter exemption from taxation.

A special statute passed for a special purpose will not be deemed to repeal by general legislation, except upon the clearest manifestation of legislative intent to effect such repeal; the manifestation must be in an express or implied direction.

ERROR of the Circuit Court of Richmond city. The case was heard at Richmond and decided at Wytheville at the June term, 1885, and upon a rehearing this decision was affirmed by the Circuit Court of Richmond, January 21st, 1886. The opinion states the case.

F. S. Blair, Attorney-General, *Christian & Christian*, vs. *B. A. Hancock* for plaintiff in error.

Pegram & Stringfellow and *B. H. Nash* for defendant in error.

RICHARDSON, J.—The case comes up on a writ of certiorari from the judgment of the Circuit Court of the city of Richmond. The case has been argued and is to be determined by this court upon the facts as agreed, as set forth in the single exception of the plaintiff to the judgment of said Circuit Court.

The real question in the case is, whether defendant is, under the laws of this Commonwealth, exempt from taxation, as held by the judgment of the court below. The facts agreed, so far as material, are briefly these:

That the Richmond & Petersburg R. Co. was chartered by act of the General Assembly of Virginia, passed March 14th, 1862.

I. That so much of the 22d section of said act (the company's charter) as is pertinent to the question in hand reads: "All engines, wagons, vehicles, and carriages purchased as aforesaid out of the funds of the company, and all their works constructed under the authority of this act, and all profits which shall accrue thereon, shall be vested in the respective shareholders of the company forever, in proportion to their respective shares; and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever."

II. That under said section of its charter, the said company, since its incorporation, has claimed, and in fact enjoyed, exemption from taxation to the present time.

V. That the exemption granted by the said 22d section of the company's charter is in full force and effect, unless said 22d section has been intended to be repealed, and in fact was repealed, by the following acts, to wit: Code 1860, sections 46-7, p. 249-50; Acts 1861-2, p. 6, § 13; Acts 1862-3, p. 7-8, § 17; Acts 1865-6, p. 12, § 12; Acts 1866-7, p. 753, § 92; Acts 1869-70, p. 303, § 48, § 55, § 8; Acts 1871-2, p. 175, § 91, p. 473, § 8; Joint Resolution of April 4th, 1876-7, p. 328; Acts 1876-7, p. 138, § 20; Acts 1877-8, p. 507, § 20.

That the property of said company was assessed for taxation under the aforesaid joint resolution of April 4th, 1877, for the years from 1865 to 1877 inclusive, and since by direction of the Board of Public Works; that said claim was promptly resisted by the company, and has never been enforced.

I. That by section 20 of the act of April 22d, 1882, for the assessment of taxes on persons, property, etc., a tax is imposed on any railroad and canal company not by its charter exempt from taxation. And it is further agreed that all acts repealing exemption from taxation, enjoyed by other companies whose charters contained such exemptions, shall be received as evidence of the intent of the legislature in this case, the court to determine the weight of such evidence.

This case has been argued by counsel on both sides with marked ability. For the plaintiff in error two propositions are contended

I. That according to the true construction of the 22d section (exemption clause) of the charter of the Richmond & Petersburg R. Co., only the shares of stock, and not the property and earnings of the said company, are exempt from taxation.

That if the first proposition be unsound, the exemption from taxation granted by said 22d section has been validly and constitutionally repealed by the legislature.

These being the questions to be determined, they will be considered in the order stated. First, then, is the said 22d section of the said company's charter susceptible of the construction contended for; or in other words, does the exemption in question extend only to the shares of stock, to the property and earnings of the company? We are of opinion that the exemption extends to the property and as well as to the shares of stock, and that the construction contended for is unsound and cannot prevail.

This is a question of legislative intent, and in solving the question in dispute we are required to look to the words employed according to their obvious meaning, and in this way ascertain and declare what was the legislative intent; what did the legislature mean by the language employed, and in the connection in which it is employed as we find it in the act?

In pursuing this inquiry we must keep in view the construction on this subject, which forbids the rendering of the right of taxation, except when the clear and unambiguous expression of the legislature will to that effect; the general rule and policy of the State to impose taxes on all property, exemptions being in the nature of exceptions to the general rule. *Cooley on Taxation*, 146.

It cannot at this day be necessary to inquire into the power of the legislature to make exemptions. The general right of taxation is involved in the right to apportion taxes. *Cooley on Taxation*, 145. In considering this precise question, *Staples, J.*, in *Richmond v. Richmond & Danville R. Co.*, 21 Gratt. 6, said: "The power of exemption, as well as the power of taxation, are of the essential elements of sovereignty."

We come now directly to the exemption clause contained in the 22d section, which reads: "All machines, vehicles, and carriages purchased as aforesaid, and all the funds of the company, and all their works and property, under the authority of this act, and all profits and shall accrue from the same, shall be vested in the respective holders of the company forever, in proportion to their respective shares; and the same shall be deemed personal estate, and shall be exempt from any public charge or tax whatsoever."

Very slight attention to the frame and structure of the provision in question will show that the construction sought to be put upon it by counsel for the plaintiff in error is far too narrow and restricted, and obviously at war with the real meaning of the legislature, as clearly set forth by the language used. The construction rests upon the idea that the word "same" in the last clause of the provision refers to "shares," which is the last word in the preceding clause, and not to the company's property and profits mentioned in said first clause. It cannot be so held without

EXEMPTION OF
PROPERTY AND
EARNINGS.

LEGISLATIVE IN-
TENT—RIGHT TO
EXEMPT.

CONSTRUCTION
OF EXEMPTION
CLAUSE—WHAT
PROPERTY EX-
EMPT.

fluence to the grammatical structure of the provision, taken altogether, as well as to the plain legislative meaning thereby expressed.

What is declared by this clause as a whole? 1st. That all machines, wagons, vehicles, and carriages, purchased with the funds of the company, as well as all the company's works constructed under the authority of the act, and all profits to accrue therefrom, shall be vested in the respective shareholders of the company forever, in proportion to their respective shares. Such is the first clause, which is separated from the remaining or last clause by a semicolon. Now it is too plain to admit of dispute that the above language "shall be vested in the respective shareholders of the company forever, in proportion to their respective shares," refers to the company's property and profits, just before enumerated, and declares in whom and how it shall vest, and performs no other office whatever, and for all other purposes is utterly useless. This being so, how is it possible to hold that the word "same" occurring after a semicolon, and in the beginning of the last clause, refers to anything short of the company's property and profits, as well as shares of stock mentioned in the first part of said first clause? Putting the whole provision together, and assigning to each member thereof its full, natural, and grammatical import, it is perfectly clear that the legislature intended to say, and did say, that the company's property, works, and profits shall be deemed and treated as personal estate, shall be forever vested in the respective shareholders of the company, in proportion to their respective shares, exempt from any public charge or tax whatsoever. That such is the clearly expressed legislative intent is too apparent to admit of doubt or to make necessary any resort to rules of construction.

Upon this question there could be a doubt, it has been put at issue by the decision of this court in the case of City of Richmond & Danville R. Co., *supra*. The correct REVIEW OF AUTHORITIES. reading of the provision in the charter of the Richmond & Danville R. Co. reads: "All machines, wagons, vehicles, or carriages belonging to the company, with all their works, and all profits which shall accrue from the same, shall be vested in the respective shareholders forever, in proportion to their respective shares, shall be deemed personal estate, and exempt from any charge or tax whatsoever."

Here we have the respective exemption clauses in respect to the two companies spread out before us for comparison. Human equity cannot suggest any substantial difference between them. The provision in the charter of the Richmond & Petersburg Co. is somewhat more wordy and emphatic, while that in the charter of the Richmond & Danville Co. is characterized by greater conciseness, importing precisely the same thing. Both declare the property, works, and profits to be personal estate, vests it in the

respective shareholders forever, in proportion to their shares, exempt from any charge or tax whatsoever.

Delivering the opinion in the case of City of Richmond & Danville R. Co., *supra*, Staples, J., in a majority opinion, said: "The obvious meaning is, that the property designated, that is, the machines and carriages belonging to the company, with all their works, should be deemed personal property, and exempt from any charge or tax whatsoever. If authorized by the legislature, this point were necessary, it may be found in the case of *the City of Baltimore v. Baltimore & Ohio R. Co.*, 6 Gill's Rep. 311. And the learned judge, proceeding, says: "It was held in that case that the real and personal property of the company was exempt from taxation, under a clause in the charter which provided 'that the shares of its capital stock should be deemed personal estate, and exempt from the imposition of any tax or duty.' The court say, the design contemplated by the legislature in the insertion of this clause was to confer a substantial, not a nominal benefit on the stockholders, and to induce capitalists to invest their money in a novel and hazardous enterprise." "To impose the same judge) "to the legislature, in the case before us, the right to exempt the shares of stock from taxation, and at the same time to reserve the right to tax everything which constitutes the stock, and gave it its value, would be gratuitously to cast a burden upon the legislature inconsistent with every principle of judicial courtesy." It cannot be necessary to pursue the discussion of the subject further. The construction contended for by the plaintiff is sustained, the intention of the legislature to exempt from taxation the property, profits, and shares of stock being manifest.

(2) We come now to the consideration of the second point. The plaintiff contended for by counsel for the plaintiff, that the right of exemption from taxation was validly and constitutionally repealed by the legislature. The real question in the case, which may be stated thus: "Did the legislature in fact repeal, or intended, by any or all the acts mentioned, to repeal the exemption granted by its charter to the Richmond & Petersburg R. Co.?"

It is conceded as settled law that an exemption from taxation granted in the charter of a railroad company constitutes a vested right which is protected by the Federal Constitution, and cannot be repealed by the State where the right to do so has not been expressly reserved, or does not exist.

From what has been already said in respect to the clause in the charter in question, it is clear that the legislature granted to this company exemption from taxation, State, county, municipal, and that all the property, profits, and shares of the said company are embraced in the exemption. It is also unquestionably true that the legislature had the right to grant

ption. See *City of Richmond v. Richmond & Danville R. Co.*, *supra*; *Home of the Friendless v. Rouse*, 8 Wall. 438, and numerous other authorities which need not be cited.

It is not pretended that, by any act of the legislature, in terms referring to this company, the contract of exemption evidenced by the 22d section of the company's charter has been expressly repealed; the fullest extent of the contention of counsel for the plaintiff in error being that the exemption has been, by necessary implication, repealed by certain acts of the legislature referred to in the case agreed. On the contrary, it is agreed that said contract of exemption is in full force and effect, unless repealed by the several acts referred to in the case agreed.

It is, however, most earnestly insisted that the exemption in question was intended to be, and in fact was, repealed by §§ 46 and 47 of ch. 3, acts 1859-60, found in the Code of 1860, at p. 200. Before commenting on the provisions of this act, it is necessary to examine, in their chronological order, several acts passed prior thereto by the legislature of Virginia, which have an important bearing upon the question, and the acceptance by this company of certain provisions of certain of them, it is insisted, remitted to the legislature the right to repeal the company's exemption from taxation, which right, it is claimed, was intended to be, and in fact was, legitimately exercised by said act passed at the session of 1859-60, before referred to.

The acts prior to the one last named, and to be first examined in the order in which they were passed, will now be considered.

1st. The charter act, passed on the 14th day of March, 1836, containing the exemption clause in favor of this company, as to which no further comment is necessary.

2d. The act passed on the 11th day of March, 1837 (Acts 1836-7, pp. 101, 112), entitled "An act prescribing certain general regulations for the incorporation of railroad companies." This act is substantially what its title imports. It professes only to prescribe certain general regulations in respect to the incorporation of railroad companies, and necessarily refers to companies thereafter incorporated. It makes no reference to the Richmond & Petersburg R. Co., or to any company incorporated prior thereto, but confines itself to its real object, that of prescribing "general regulations." And it is a fact, the striking importance of which will hereinafter appear, that this act of 1837, known as the general railroad law, does not contain one word either in respect to imposing taxes on railroad companies, or in respect to the exemption of such companies from taxation.

3d. The insistence is, that by reason of the acceptance by this company of certain provisions contained in the subsequent act,

REPEAL BY IMPLICATION.

ACTS OF LEGISLATURE CONCERNING RIGHT OF EXEMPTION.

passed March 30th, 1838 (hereinafter to be considered), is subject to all the provisions of the general railroad law of March, 1837, and especially the 35th section thereof, which reads: "Any part of any charter or act of incorporation, granted in pursuance of the provisions of this act, shall be subject to be amended, or modified by any future legislature as to the terms and conditions, so far as they may seem proper, except so much thereof as prescribes the rate of compensation or tolls for transportation: *provided, that the property acquired under this act, or any other act adopted in pursuance of the provisions of this act, shall not be taken away or impaired by any future act of the legislature.*"

The words of this proviso are italicized by me in order to give due prominence to the true spirit and intent of this provision in the general railroad law.

3d. We come to the consideration of the act of March 30, 1838, entitled "An act concerning the Richmond & Petersburg R. Co." This act contains the only legislative reference to this company subsequent to its incorporation in 1836, except a certain joint resolution passed on the 4th of April, 1877, which will be noticed in its appropriate place. The first section of this act provided that the Board of Public Works should pay at once the whole unpaid subscription of the State to the shares of the capital stock of the Richmond & Petersburg R. Co. authorized by a prior act, passed January 17th, 1837, in pursuance of the regular calls, the money so paid to be applied to the payment of the State's subscription, as they shall fall due, and the interest in excess of the quotas so due to bear interest at six per cent. on the whole amount advanced should be absorbed by such quotas.

Passing for the present the 2d section, we come to the consideration of the same act, which provided that the Board of Public Works should, on behalf of the commonwealth, loan to the Richmond & Petersburg R. Co. \$150,000, the payment of which should be secured by a mortgage executed by the company to the Board and directors of the Board of Public Works on all the real estate, property and net income, said loan to be made out of the unapplied income of the fund for internal improvement, and the same to be secured by a mortgage on the same property to secure the repayment of said loan with interest to be paid to the County Court of Chesterfield County. The 4th section provided, "That if the income of the fund for internal improvement be inadequate to pay the said loan, the said Board of Public Works are authorized to borrow the requisite amount on the same terms and conditions prescribed in the act passed at the present session, entitled 'An act to authorize a loan, on the part of the commonwealth, to the Winchester & Potomac R. Co.'"

Now, the 2d section of the same act, referred to above, was temporarily passed by, provided: "Be it further enacted, that

company avail themselves of the benefit of this act, it shall be subject to all the provisions of the act entitled 'An act prescribing certain general regulations for the incorporation of railroad companies,' passed March 11th, 1837, and any provision or provisions in the act incorporating said company, inconsistent with the said act of March 11th, 1837, shall be and the same is hereby repealed." Then follow other provisions not applicable here. Such are the provisions of the act of March 30th, 1838, relied on by the plaintiff in error; which provisions, it is agreed, were accepted by the Richmond & Petersburg R. Co. The question right here is, To what extent is the charter exemption of this company from taxation affected by its acceptance of said provisions?

The general tax laws prior to 1860 uniformly provided that every railroad and canal company, not exempted by its charter from taxation," should make certain reports and pay GENERAL TAX LAW. certain taxes. The general tax law of 1860, passed at the session of 1859-60 (see Code 1860, p. 200), omits the words "not exempted by its charter from taxation," and the contention is that the legislature, by this omission merely in the general tax law, intended to repeal, and did repeal, the 22d section of this company's charter. We are clearly of opinion that this view cannot be maintained without utterly disregarding well-established rules of judicial construction.

It is true that by the acceptance of the act of March 30th, 1838, this company became subject to the provisions of the general railroad law of March 11th, 1837; but it is argued by counsel for the plaintiff in error that the exemption clause in this company's charter thereby became subject to be altered, amended, or modified at the will of any future legislature: and for this proposition counsel rely on *Tomlinson v. Jessup*, 15 Wall. 454, and *Spring Valley Water Works v. Schottler*, 110 U. S. 347, and similar cases. These cases have no application here. In the case first named the charter was granted under a law which provided that "every charter or incorporation granted, renewed, or modified as aforesaid shall, at all times, remain subject to amendment, alteration, or repeal by the legislative authority." In the second case the law provided: "Corporations may be formed under general laws, but shall not be created by special act except for municipal purposes. All general laws and special acts passed pursuant to this section may be altered from time to time or repealed."

From these provisions of law which controlled these cases it is obvious that they have no bearing upon the case in hand, except upon the idea that the acceptance by this company of the provisions of said act of 1838 rendered its exemption liable to be repealed, and that said exemption was repealed, as aforesaid, by the

EFFECT OF ACCEPTANCE OF ACT OF MARCH 30, 1838.

general tax law of 1860. Can the last-named act be so construed? We think not.

It is admitted that in 1860 there were railway companies in Virginia liable to taxation, and others exempt by irrevocable contracts contained in their charters. This being so, to construe the words "every railroad company" so as to embrace necessary companies, would be to render the act plainly unconstitutional in construction that will never be adopted when any other, consistent with the constitution, can be given.

The principles applicable to the repeal of statutes by implication are few and simple. The general rule laid down in *Case, 6 Coke, 19 b.*, and, so far as known, uniformly

accepted as correct, is that "a later statute affirmative shall not take away a former act *potius* if the former be particular and the latter general." It is said that this rule is enforced more rigidly when the act made, by a later general law, to repeal the provisions of a special charter, than in any other class of cases. *Town of v. La Salle, 12 Ill. 340; People v. Quizy, 59 N. Y. 88; People v. Wightman, 78 Ill. 552-3; Frostdick v. Perrysburg, St. 485-6-7; and especially The State v. Minton, 3 Zab.*

numerous other cases. The well-settled doctrine derived from all authorities is that "laws, special and local in their application, are not repealed by general legislation except upon the clear manifestation of an intent by the legislature to do so. In such repeal, and ordinarily an express repeal of a special act, reference to the special act is necessary to ascertain that end." This doctrine is especially illustrated in the case of *Mayor, etc., v. The Baltimore & Ohio R. Co., 6th Gill & Cress.* Perhaps the rule is nowhere more concisely stated than in *Sedgwick*, who says, "the rule has been laid down in *The repeal of a special statute passed for a special purpose, either be express, or the manifestation of the legislative intent to repeal must be so clear as to be equivalent to an express repeal.*" Citing *Cole v. Supervisors, 11 Iowa, 552.* See also *on Stats. and Consts. 99, note.*

Is it not clear that the legislature, by the use of the words "every railroad," etc., in the general tax law of 1860, intended every railroad not exempt by its charter from taxation? The construction contended for on behalf of the plaintiff would impute to the legislature, (1) the deliberate design, both the Federal and State constitutions, and (2) the purpose of "resorting to indirection to find direction out." To impute to the legislature either motive would be grossly disrespectful to say the least.

EXEMPTION FROM TAXATION—REPEAL OF STATUTE. 491

low and to what extent did the provisions of the acts aforesaid, accepted by the company, affect its charter?

In the first place, the 35th section of the act of March 11th, 1837 (the general railroad law), only provides that any part of any charter or act of incorporation, granted agreeably to the

provisions of that act, should be subject to be altered, ^{EFFECT OF ACTS ON CHARTER.} amended, or modified by any future legislature as to

it may seem proper, etc., but with the express proviso that the rights of property acquired under that act, or any other act adopting the provisions of that act, should not be taken away or impaired by any future act.

Now, this company's charter was granted by special act passed prior to said general railroad law, and was not granted agreeably to the provisions thereof, and obviously was not by said 35th section intended subject to be altered, amended, or modified by future legislation. Then, when we look to the carefully-worded and far-reaching proviso to that section, it is difficult to imagine how language could have been chosen better calculated to repel and preclude the construction contended for. But it is argued that this section refers to property and property rights acquired by the company, but not to privileges and immunities granted by the State to the company. It would seem to be too clear to need comment, that under the very comprehensive language of this company's charter, the right to acquire property and hold the same exempt from taxation makes such exemption a right appurtenant, attached, or belonging to property; or, in other words, is a "right in property," such as is expressly protected by the proviso to said section, and cannot be taken away without the company's consent.

Next comes the act of 1838, by which, among other things, the sum of \$150,000 to this company was directed, which loan was accepted. The 2d section of this act, and the one relied on, provides that if this company should avail themselves of the benefits of this act, it should be subject to all the provisions of the general railroad law of 1837, and provided further that any provision or provisions in the act incorporating this company, inconsistent with said general railroad law, should be, and were thereby repealed.

Now, the Richmond & Petersburg R. Co. did avail themselves of this act of 1838, and did become subject thereby to the provisions of the general railroad law of 1837, in which there is not one word in reference to taxing railroads, and there can, therefore, be nothing in the 22d section of this company's charter, exempting it from taxation, inconsistent with said general railroad law.

Much reliance is also placed on the act of February 13, 1838, concerning the Winchester & Potomac R. Co. By that act the

State made a loan to that company, and authorized the Public Works to borrow the money therefor on certain conditions in the act prescribed, and it was expressly provided that the exemption of the provisions of that act, by that act, should be upon the condition that the legislature have the power to tax the stock, property, and profits of said company. There is no such provision in respect to the Richmond & Petersburg Co. either of the acts relied on. But it is argued that, by the passage of the act of March 30, 1838, the loan to this company having been made under the fourth section thereof, it is that company at once became subject to the provisions of said act, from the 13th February, 1838, and liable to taxation. This is clearly an apprehension of the relations of the two last-named acts. The loan to the Richmond & Petersburg Co. was made under the fourth section of the act of 1838, but under the fourth section thereof, and was directed to be paid out of the income of the fund for internal improvement; but out of abundance of caution, lest that fund should prove insufficient (which turned out to be the case), it was provided by the said fourth section that, in the event named, the Board of Public Works should borrow the money upon the "same terms and conditions prescribed in the act concerning the Winchester & Potomac R. Co." Clearly, the "same terms and conditions," found in said fourth section of the act of March 30, 1838, refer to and control the Board of Public Works in negotiating the loan, and have no reference to the company; and, while the money loaned this company was raised under the provisions of said fourth section, that section by no means relieves the construction can be held, under the circumstances, to operate as a relinquishment of the exemption from taxation granted to the company in the 22d section of its charter. Neither of the acts relied on indicate any purpose on the part of the legislature to repeal the exemption in question. It would be unjust to impute to the legislature an intention which in terms it seems not to have intended to preclude. It is true that since 1860 the general laws have not uniformly, as before that time, excepted companies from taxation exempted by their charters; in some instances the exemption has been made, and in others not made, but the language, "every company," etc., being used. That this course by the legislature seems erratic and inconsistent at first blush is true, but as shown by this court in *Warder & Warder v. Cuell*, 2 Wash. 299, the ever apparent inconsistencies may appear in the declaration of legislative will, yet it is not decent to presume that the legislature will change their mind upon the subject without saying so in its terms.

In *The State v. Minton*, *supra*, a case strongly in point, the court said: "The reasonable inference always is that wh

slature intends to take away chartered exemptions from taxation, they will do it in express terms, and, *eo converso*, if they do not do it in express terms, they do not intend to do it." From all these authorities, the conclusion is irresistible that, notwithstanding the omission from the act of 1860 of the words, "not exempted by their charters from taxation," the legislature meant to do only what it could lawfully do, and meant precisely the same it did in the former tax laws, and had no intention, by the omission of said words, to repeal the exemption clause in this charter, and certainly did not repeal it. Whenever the legislature has undertaken to repeal the exemption from any railroad from taxation, it has done so in express terms, not in implication. This is illustrated by certain legislation had during the late war, when, pressed by dire necessity, enormous taxes were imposed on every subject of taxation that could be reached, and on taxes were attempted to be imposed on all railroad companies, whether exempted by their charters or not. See Acts of 1862-3, p. 6, § 13, and Acts 1862-3, pp. 7, 8, § 17. But in these cases the legislature took the precaution to use the language necessary to show that it intended to embrace under the words, "Every railroad," etc., all railroad companies, whether by their charters exempt or not, so far as the legislature had power to do so. What would have been more idle and absurd than this legislation, if, as intended, the very object had been obtained by the previous act of 1860? These acts were measures suggested by the necessities of the great civil war. It is only necessary to say in dismissing this from further consideration, that they were never enforced against this company.

It only remains to notice in very few words the joint resolution of April 4, 1877. It is impossible to give to this joint resolution any other force or effect than what its terms import. It does not purport to lay any tax, but is only a legislative construction of the charter of the Richmond & Petersburg Railroad Co., and as such without any binding authority upon this court. The effect instructs the auditor to assess this company under the existing law. But with this instruction (a plainly erroneous one before them, the proper officers took no steps to assert this as to taxes until this proceeding was commenced in 1883. The delay is significant of the fact that upon mature consideration it was discovered that the legislative construction, which is the basis of this joint resolution, was without foundation. It is all the more conclusive when we reflect that at the very next session, and only a few days after the passage of this joint resolution, to wit, on 13th March, 1877 (see Acts 1876-7, p. 138), taxes were imposed only on such railroad companies as are not exempted by their charter from taxation; and the law passed at the session of 1877 is to the same effect. Here, then, by the very latest declaration

INTENTION OF
LEGISLATURE TO
REPEAL EXEMPTION
CLAUSE.

JOINT RESOLUTION
OF APRIL
4, 1877.

ration of the legislative will, we have in effect a direct of the right to tax this company. However unwise the policy of exemption may have proved, we cannot count law must prevail. We are of opinion that this company tion has not been, nor intended to be repealed. We are opinion that the exemption embraces the property and the company, and also the shares of stock of the respect holders; and that the same is exempt from taxation, State and municipal. There is no error in the judgment of below, and the same must be affirmed.

Judgment affirmed.

PEOPLE *ex rel.* STATE AUDITOR

v.

ILLINOIS CENTRAL R. CO.

(*Advance Case, Illinois. March 27, 1886.*)

Whether property is exempt from taxation depends on facts be ascertained by a jury, or trying tribunal acting as such. facts are determined, it is a question of law as to exemption.

One claiming that property is exempt from taxation must establish a fact by clear and satisfactory proof; and a statute exempting "all such real estate and other property as may be necessary for the construction of its railway stations and other accommodations" include a grain elevator.

ORIGINAL suit by State auditor.

George W. Hunt, Attorney-General, for the people.
Green & Gilbert for appellee.

MULKEY, J.—The question for determination is whether a certain grain elevator belonging to the Illinois R. Co. is exempt from taxation for other than State purposes. The elevator in question is built on the banks of the river on a lot of ground belonging to the company, within the corporate limits of the city of Cairo, and is known as the "Grain Elevator." It is within about 50 feet of the main track of the company's road leading into the city, and is connected by side tracks. It is so constructed as to receive and store grain both by rail and river, though much the largest part of its business is done by rail. It was completed by the company in the fall of 1881, and in about a year afterwards was let to

y to the Halliday Bros., who have had exclusive control of it since. The rental or compensation which the company receives for the use of it is regulated by the amount of business; that is, the company is paid by the lessees a specified sum for a bushel of grain received into it. Just what this sum is does not appear from the evidence. The Halliday Bros. charge a cent and a half per bushel for the storage of grain, and permitting it to remain in the elevator for a period of ten days or less, and an additional half cent per bushel for every additional ten days it remains therein. The building has a capacity of 750,000 bushels, and the grain is stored therein according to grade, and not according to ownership. It cost some two or three hundred thousand dollars.

Henry S. Halliday, one of the lessees, and Horace Tucker, general freight agent of the company, were both examined as witnesses on behalf of the appellant. These witnesses concur in the opinion that the Illinois Central R. Co. could not determine the amount and character of grain business now

NECESSITY OF
ELEVATOR TO
OPERATION OF
ROAD.

be done by it without an elevator, and they therefore conclude, and state in their testimony, that such an elevator is necessary to a successful and complete operation of the company's road in the transaction of its grain business. If the conclusion to be reached depended alone upon the opinion of witnesses, we should not hesitate to reverse the judgment of the county court for holding, as it did, that the property was subject to local taxation. But, clearly, these opinions are not conclusive; nor can they have anything like a controlling influence in the decision of the question. What constitutes an exemption from taxation is a question of law; but whether a particular piece of property is within the exemption or not depends upon the existence or non-existence of certain facts capable of proof, which, of course, is a matter for the determination of a jury, or trying tribunal performing the functions of a court, as was the case here. When the relations of the property to the road, and the uses to which it is applied, are ascertained, it becomes a question of law whether it is exempt or not. In reviewing this case, we must pass upon the facts, as well as the law, and from the facts proved must determine the true relations of the property in question to the road, and its operation, rather than rely upon the opinions of witnesses.

The power to raise money by taxation is universally admitted to be inherent in every State or sovereignty, since without it the necessary means of defraying the expenses of government could not be provided, except in the case of mere socialism. As this right of taxation, then, is inherent and essential to the very existence of government itself, the principle universally recognized by courts and political writers is that the State cannot wholly barter it away, or otherwise dispose of it; and even a partial disposition of it has been admitted by the court with great

NATURE OF EX-
EMPTION LAWS.

hesitation and reluctance. Cooley, Const. Lim. 284. It is obvious that all laws exempting property from taxation are not only restrictions or limitations on the taxing power, but they necessarily result in an unequal distribution of the burdens of government. The effect is not only to release the property exempted from the payment of its due proportion of taxes, but that which it ought to pay and would pay under an equal and fair apportionment of them must also be collected from the property not exempted. These considerations have very properly induced courts to adopt what is known as a strict construction in giving effect to such laws. Hence nothing will be held to come within the exemptions which does not clearly appear to be so, and all reasonable intendments will be indulged in favor of the State. Presumably all property is subject to taxation. When, therefore, it is claimed that a particular piece or class of property is exempt, the party interposing the claim must come prepared to establish it by clear and satisfactory proof. Thus it is said in the case of *People v. Graceland Cem. Co.*, 86 Ill. 336 :

"The true spirit of our laws requires that all property should bear its just proportion of the burden of taxation; and, when an exemption is made in favor of a corporation, justice demands that it should show clearly a compliance with the terms and spirit of the act exempting it from taxation, before it can be permitted to escape a duty incumbent equally on every citizen."

The general principle here announced is also recognized in the following cases decided by this court: *First M. E. Church v. Chicago*, 26 Ill. 482; *Pace v. County Com'rs of Jefferson Co.*, 20 Ill. 644; *People v. Western Seaman's Friend Soc.*, 87 Ill. 246; *Huck v. Chicago & A. R. Co.*, 86 Ill. 352.

In the present case it is claimed that the elevator in question is exempt from taxation under the twenty-second section of the company's charter, which will be found in the Private Laws of 1851, p. 72. That section, after exempting from taxation the lands granted to the company by the State until they were sold, and also the "stock, property, and effects of the company," for six years from date of the act, directs that thereafter the stock, property, and assets belonging to the company shall be assessed and taxed, to a limited extent, for State purposes." It then declares that "the said corporation is hereby exempted from all taxation of every kind, except as herein provided for." It must be conceded the language of this section is very broad; and, if considered without reference to the objects and purposes of the act, it is clearly broad enough to include the property in question. Indeed, if the provision is to be construed independently of this consideration, and is to be enforced according to its literal terms, it would include any kind of property whatever. And yet no one, we presume, would take so extreme a view as that. It is

CONSTRUCTION
OF EXEMPTION
CLAUSE IN
CHARTER.

very certain the learned counsel for appellant do not. It does not appear from the evidence, nor is it claimed, that the land upon which the elevator is built is a part of the original grant by the State to the company, and hence the exemption cannot be placed upon that ground.

The company, however, is authorized by the first section of its charter to "purchase, hold, and use all such real estate and other property as may be necessary for the construction of its railway and stations, and other accommodations as ^{"OTHER ACCOMMODATIONS"—} may be necessary to accomplish the objects of its in- ^{ELEVATOR.} corporation;" and the contention of appellant, as we understand, is that the property in question falls within the general description in the concluding part of the section, namely, "other accommodations," etc., and that it is therefore exempt from taxation. This conclusion is based upon the assumption that the exemption is coextensive with the right to acquire or hold property of any kind. This position we do not regard as sound; but, conceding it is for the purposes of the argument, it does not necessarily follow that the construction relied on is the correct one. We cannot believe it was intended, by the general description mentioned, to include objects of a different kind or class from those specifically mentioned in the preceding part of the section. It is a well-settled doctrine that in construing statutes, particularly those requiring a strict construction, as is the case here, a general description, like the one in question, following a specific enumeration of objects or things, will be held to include only such things or objects as are of the same kind as those specifically enumerated. Applying this principle to the section cited, as we must, so far as the question of exemption is concerned, we see nothing in it which strengthens the claim of the appellant. By it the company is authorized "to purchase, hold, and use all such real estate and other property as may be necessary for the construction of its railway and stations and other accommodations," etc. Under the rule of construction in question, whatever is included in the expression "other accommodations" must be of the same class or kind as "railway and stations."

Without at all attempting to state the various articles or subjects of property that would clearly belong to the class of things specifically enumerated, we would say that it doubtless includes the road, with all necessary switches, together ^{WHAT PROPERTY INCLUDED IN} with all structures thereon; also rolling stock, with all ^{CLASS.} its machinery and appendages—warehouses and other structures—at the *termini* or along the line of the road belonging to the company, and used by it exclusively for the reception of passengers, the storage of freight, and also for the purpose of keeping the road and rolling stock in repair or of improving their general condition. This, of course, would include all

necessary depot grounds and buildings, machine and work shops of all kinds, machinery, tools, and implements of every description used in keeping the road and rolling stock in repair, and in a good, safe condition. All these things, it will be perceived, have an immediate connection with the improvement and operation of the road. Whatever would be necessary to increase its capacity, such as laying down an additional track, or increasing the amount of rolling stock, would fall within the same category. But it is evident this elevator does not belong to any of the classes of things enumerated. It has no direct connection with the road or its operation. Yet, when shipments of grain are made either to or from it over appellant's road, it is very clear appellant can handle the grain thus shipped with more ease and greater facility, and hence can, by means of it, do a greater amount of business. But this is purely incidental, and falls far short of establishing the proposition that a vast elevator like this, costing two or three hundred thousand dollars, is a necessary appendage of a railroad, or that the legislature, in granting the appellant's charter, intended to exempt such a structure from taxation. It is clear the advantages accruing to the company, as shown by the evidence, do not at all result from its ownership of the property. Had the elevator been built and operated in the same manner it now is by some one other than the company,—for instance, the Halliday Bros.,—the company, so far as facilitating its business as a common carrier is concerned, would derive the same benefit from it that it now does. As a mere carrier, the company has no right to put a bushel of grain in it, except when directed to do so by the shipper or consignee. This necessarily results from the fact that all grain, as is shown by the testimony, is stored in it according to grade, and not according to ownership. As to a railway warehouse, properly so called, the rule and usage is altogether different. On the arrival of a consignment of goods the company has a right to at once store them in its own warehouse. The appellant is bound to carry grain in bulk, and deliver the same from cars or other convenient places of storage, without extra charge, now, just the same as it was before the elevator was built, if so required; and the company has no right to mix one man's grain with others, unless permitted to do so by the owners.

It is clear, therefore, outside of the incidental benefits resulting to the company from a law of business, rather than any municipal regulation, the elevator has no necessary connection with the construction, maintaining, or operation of appellant's road; and, such being the case, it clearly does not come within the exemption. If the elevator was used exclusively by the company in receiving grain for shipment, or for storing it after shipment, without any additional charge therefor, except where the owner neglected to take it away within a reason-

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WITH OPERATION
OF ROAD.

able time after its arrival, the property would then be clearly exempt from taxation; but such is not the case. Buildings used for the storage of grain for compensation are indifferently called warehouses, granaries, and elevators. Vast amounts of capital are invested in them, and, like railroads and other *quasi* public property, are under legislative control. Their construction and operation constitute a distinct business in the State, of vast magnitude. They are a great convenience to the community in which they are situated, and particularly to the owners of the railways, with which they are almost universally connected. Capitalists invest money in them for the same reason they do in other things—because they think it will pay. They are supported by contributions from dealers in grain, in the shape of tolls, which are always taken into account in buying and selling; hence the consumer in the end pays these expenses or contributions. So, in this case, the building of the elevator was a mere investment by the company, and it is now regularly collecting tolls from those who use it, through the Halliday Bros. These tolls, thus collected, are simply the returns of the company's investment. It is not reasonable to suppose the legislature intended that property representing so large an amount of capital should be exempt from local taxation when the people at large are thus taxed for every benefit derived from it.

But this is not a new question in this court. We regard the case of *Appellant v. Irvin*, 72 Ill. 452, as an authority directly in point against the claim of the company in this case. There it was claimed that a transfer-boat belonging to appellant was, under the provisions of its charter now under consideration, exempt from local taxation. The boat in question was used by the company in carrying passengers and freight between Cairo and Columbus, Kentucky, there forming a connecting link between the Illinois Central and the Mobile & Ohio railroads. This court in rejecting the claim of appellant in that case, and in giving a construction to appellant's charter, held the following language:

"The taxes from the payment of which the legislature intended to release appellant could have been only the taxes which a railroad corporation would be otherwise liable to pay upon its property acquired in the prosecution of its business, in constructing and operating these lines of road."

The elevator clearly does not fall within the exemption according to the rule here laid down. The judgment must be affirmed.

VICKSBURG, SHREVEPORT AND PACIFIC R. Co.

v.

DENNIS.

(116 U. S. Supreme Court Reports, 665.)

A provision in a charter granted by a State to a railroad company which "the capital stock of said company shall be exempt from taxation on its road, fixtures, workshops, warehouses, vehicles of transportation, and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this State," does not exempt the road, fixtures, and appurtenances from taxation before such completion of the road.

The omission of taxing officers to assess certain property cannot excuse the duty imposed by law upon their successors, or the power of the legislature to tax the property, or the legal construction of a statute upon its exemption from taxation is claimed.

ERROR to the Supreme Court of the State of Louisiana.

The original suit was brought by the sheriff, and *ex officio* collector of taxes, of the parish of Madison in the State of Louisiana, to recover the amount of taxes assessed, under general law of the State, in 1877 and 1878 to the Vicksburg, Shreveport & Texas R. Co., and in 1880 to the Vicksburg, Shreveport & Pacific R. Co. upon thirty-four miles of railroad, with fixtures and appurtenances in that parish.

The Vicksburg, Shreveport & Texas R. Co. was incorporated April 28, 1853, by a statute of Louisiana, to construct and maintain a railroad from a point in the parish of Madison on the Mississippi River opposite Vicksburg, westward by way of Shreveport, to the line of the State of Texas.

Section 2 of that statute was as follows: "The capital stock of said company shall be exempt from taxation, and its road, workshops, warehouses, vehicles of transportation, and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the limits of this State."

The eastern part of the railroad, from Vicksburg to about seventy-five miles, was completed before January 1, 1862, and the western part, from Shreveport to the Texas line, about twenty-five miles, was completed before January 1, 1862. The central part, from Monroe to Shreveport, about one hundred miles, was uncompleted. The further construction of the railroad was prevented and suspended during the civil war, and much of the track, bridges, stations, and workshops was destroyed by the armies.

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Soon after the return of peace, a holder of four out of a large number of bonds secured by a mortgage executed by the corporation on September 1, 1857, of its railroad, property, and franchises, commenced a suit in a court of the State of Louisiana, and obtained a decree for the sale of the whole mortgaged property, and it was sold under that decree.

Upon a suit afterwards brought by a very large number of the bondholders, in behalf of all, in the Circuit Court of the United States, that sale was, by a decree of this court at October term, 1874, annulled as fraudulent and illegal, and the railroad, property, and franchises ordered to be sold for the benefit of the bondholders and other creditors of the corporation. *Jackson v. Ludeling*, 21 Wall. 616.

On December 1, 1879, they were sold pursuant to this decree, and purchased by a committee of the bondholders, who on the next day organized themselves with their associates into a corporation under the general statute of Louisiana of March 8, 1877, by the name of the Vicksburg, Shreveport & Pacific R. Co., and now claimed to be entitled under this statute to all the rights, powers, privileges, and immunities of the Vicksburg, Shreveport & Texas R. Co., including its exemption from taxation.

In 1881 and 1882 the new corporation made contracts for the completion of the railroad between Monroe and Shreveport, and began to complete it; but it has not yet been completed.

The Supreme Court of Louisiana held that the provision of the statute of 1853, exempting the railroad, fixtures, and appurtenances "from taxation for ten years after the completion of said road," did not relieve the old corporation from taxation before the road was completed; and therefore gave judgment for the plaintiff, without determining whether the new corporation had succeeded to the rights of the old one in this respect. 34 La. Ann. 954.

A writ of error was sued out by the defendant, and allowed by the chief justice of that court, because there was drawn in question the validity of a statute of, or an authority exercised under, the State, on the ground of its being repugnant to the Constitution of the United States, as impairing the obligation of contracts, and the decision was in favor of its validity.

Edgar M. Johnson for plaintiff in error. *George Hoadly* and *Edward Colston* were with him on the brief.

Thomas O. Benton for defendant in error. *John S. Young* was with him on the brief.

GRAY, J.—In determining whether a statute of a State impairs the obligation of a contract, this court doubtless must decide for itself the existence and effect of the original contract (although in the form of a statute) as well as whether its obligation has been impaired. Louisville & Nashville

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OBLIGATION OF
CONTRACT BY
STATUTE.

R. Co. v. Palmes, 109 U. S. 244, 256, 257, and *cas Wright v. Nagle*, 101 U. S. 791, 794. But the construction by the Supreme Court of Louisiana to the contract relief in the present case accords not only with its own decision in the case of *Baton Rouge R. Co. v. Kirkland*, 33 La. A. 1, but with the principles often affirmed by this court.

In the leading case of *Providence Bank v. Billings*, 4 Chief-Justice Marshall, speaking of a partial RELEASE OF TAXING POWER BY STATE. the power of taxation by a State in a charter of incorporation, said: "That the taxing power is of vital importance, that it is essential to the existence of government, are truths that it cannot be necessary to reaffirm." "As the whole community is interested in retaining it undiminished, that community has a right to insist that its abandonment ought not to be presumed in which the deliberate purpose of the State to abandon it should not appear." "We must look for the exemption in the face of the instrument; and if we do not find it there, it would be very far to insert it by construction." 4 Pet. 561-563.

In *Philadelphia & Wilmington R. Co. v. Maryland*, 376, Chief-Justice Taney said: "This court on several occasions has held that the taxing power of a State is never to be relinquished, unless the intention to relinquish is clear and unambiguous terms." 10 How. 393.

In the subsequent decisions, the same rule has been held and constantly reaffirmed, in every variety of expression. It has been said that "neither the power of taxation, nor any other power of sovereignty, reserved to the States, has ever been held by this court to have been surrendered, unless such a surrender is expressed in terms too plain to be mistaken;" that "a contract of exemption from taxation 'should never be assumed unless the language is too clear to admit of doubt;'" that "nothing can be taken from the State by presumption or inference; the surrender, when made, must be shown by clear, unambiguous language, which is not to be of no reasonable construction consistent with the reservation of the power; if a doubt arise as to the intent of the legislature, the doubt must be solved in favor of the State;" that a State "cannot by ambiguous language be deprived of this highest attribute of sovereignty;" that any contract of exemption "is to be strictly construed, and never permitted to extend, either in scope or effect, beyond what the terms of the concession clearly require;" that such exemptions are regarded "as in derogation of the sovereign authority and of common right, and therefore not to be extended beyond the exact and express requirement of the instrument, construed *strictissimi juris*." *Jefferson Branch Bank v. State of Louisiana*, 1 Black, 436, 446; *Gilman v. Sheboygan*, 2 Black, 413; *Delaware Railroad Tax*, 18 Wall. 206, 225, 226; *Hoge v. Board of Commissioners*, 99 U. S. 348, 355; *Southwestern R. Co. v. Wichita*, 100 U. S. 309, 311.

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S. 231, 236; *Erie R. v. Pennsylvania*, 21 Wall. 492, 499; *Memphis Gaslight Co. v. Shelby Taxing District*, 109 U. S. 398, 402; *Tucker v. Ferguson*, 22 Wall. 527, 575; *West Wisconsin v. Supervisors*, 93 U. S. 595, 597; *Memphis & Little Rock R. Co. v. Railroad Commissioners*, 112 U. S. 609, 617,

it is argued in support of this writ of error, that as the exemption from taxation of the capital stock was unqualified and perpetual, and began at the very moment of the creation of the corporation, the further exemption of the railroad and its appurtenances, conferred in the same section, was intended to begin at the same moment, although limited in duration to ten years after completion of the road; and that the legislature, while exempting the railroad from taxation for ten years after its completion, could not have intended to subject it to taxation before its completion, and while its earnings were little or nothing.

On the other hand, it is argued that the consideration of the exemption from taxation, as of all the franchises and privileges granted by the State to the corporation, was

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OF EXEMPTION.

the undertaking of the corporation to prosecute to completion within a reasonable time the work of building the whole railroad in the Mississippi to the Texas line; that one reason for denying the exemption of the railroad and its appurtenances from taxation as "for ten years after the completion of said road," without including any time before its completion, was to secure a prompt execution of the work, and to prevent the corporation from defeating the principal object of the grant, and prolonging its own immunity from taxation, by postponing or omitting the completion of a portion of the road; and that the State had never intended a similar exemption to take place, except after a railroad had been entirely finished; and this argument is supported by the opinions of the Supreme Court of Louisiana in *State v. Morgan*, 28 La. Ann. 482, 491, and in the case at bar, 34 La. Ann. 954, 958.

Each of these arguments rests too much on inference and conjecture to afford a safe ground of decision, where the words of the statute creating the exemption are plain, definite, and unambiguous.

In their natural and their legal meaning, the words "for ten years after the completion of said road" as distinctly exclude the time preceding the completion of the road as the time for which the exemption was intended. If the legislature had intended to limit the end only, and not the beginning, the exemption, its purpose could have been easily expressed by saying "until" instead of "for," so as to read "until ten years after the completion," leaving the exemption to begin immediately on the granting of the charter.

"TEN YEARS
AFTER COMPLE-
TION"
CON-
STRUED.

To hold that the words of exemption actually used by the legislature include the time before the completion of the road would be to insert by construction what is not to be found in the language of the contract; to presume an intention, which the legislature has not manifested in clear and unmistakable terms, to surrender the taxing power; and to go against the uniformity of the decisions of this court upon the subject, as in the cases above referred to.

The omission of the taxing officers of the State in the years to assess this property cannot control the duty imposed by law upon their successors, or the power of the legislature to alter the legal construction of the statute under which the exemption is claimed.

In the case of *Morgan v. Louisiana*, 93 U. S. 217, the decision in 28 La. Ann. 492, neither this court nor the Supreme Court of Louisiana expressed any opinion upon the question before us, because both courts held that, the sale of the property in that case having taken place before the passage of the act of 1877, whatever rights were conferred by a similar clause of exemption had not passed to the purchasers.

Judgment affirmed.

Mr. Justice FIELD (with whom concurred the Chief Justice, Mr. Justice MILLER, and Mr. Justice BRADLEY), dissents. I am obliged to dissent from the judgment in this case, although I concur with the majority of the court in all that is said in the opinion as to the construction of statutes, which are alleged to exempt from the taxing power of the State certain property within its jurisdiction. Where there is a doubt as to their construction, whether or not they create the exemption it should be solved in favor of the State. But here it does not seem to me there can be any such doubt. The statute in question declares that the capital stock of the railroad "shall be exempt from taxation, and its roads, fixtures, shops, warehouses, vehicles of transportation, and other appurtenances, shall be exempt from taxation for ten years after the completion of said road within the State." This exemption was designed to aid the road, and was, therefore, much more necessary during its construction than when completed. It seems a perversion of the purpose of the statute to hold that it is to be applied to the progress of the desired work, and to the burden only when finished. The enterprise is nursed, according to the majority of the court, not in its infancy but when successfully carried out and needs no support.

I am authorized to say that the Chief Justice, Mr. Justice MILLER, and Mr. Justice BRADLEY concur with me in the

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Exemption from Taxation—Construction of Acts and Charter.—When claim of exemption from taxation, total or partial, is asserted by a corporation or an individual, the legislative intent must be expressed in clear and unambiguous terms, and cannot be inferred from language of doubtful import; the rule of construction, in reference to such statutes, requiring that the narrowest meaning is to be taken which will fairly carry out the intent of the legislature."

By an act approved February 4, 1860, the corporate authorities of the city of Mobile were authorized to grant to any person, association, or company the right and privilege of constructing a railroad along and through the streets in the city, for a period not longer than twenty years, and to describe the kind of rail to be used, the width and length of the track, the location of turnouts, etc.; and they were authorized to impose and collect, from each company, person, or association erecting any railway under the authority of this act, "a tax of one dollar on every hundred dollars of the gross earnings of such railway company, which tax, it was declared, "shall be in lieu and in full of all taxes and impositions of any nature in favor of the city of Mobile, upon such railway, equipments, stock, and appendages." The appellant corporation, chartered in 1858, under the name of the Mobile Omnibus Company, "was authorized by an act amending its charter, approved February 24, 1860, "upon obtaining the consent of the corporate authorities of the city of Mobile, to construct and use their railway on any street or streets in said city; provided, however, that all restrictions, limitations, and conditions prescribed in the act" above named, "shall apply to said company, should it obtain the privilege from said city authorities to construct and use such railroad." *Held*, that the provision in reference to the special tax authorized by said act of February 4, 1860, was not one of the "restrictions, limitations, and conditions" referred to in the proviso; and that said corporation, having obtained the consent of the city authorities, and constructed its railroad through the streets of the city, could not claim the benefit of said provision, and was subject to other taxation. *Dauphin, etc., R. Co. v. Kennerly*, 74 Ala. 583.

An Act granting Immunity from Taxation should be strictly construed.—Where a railroad charter provided that on each \$100 of its stock a specified amount and "no more" should be paid for State purposes, *held*, the term "no more" is a limitation on the amount of tax to be levied on the road for State purposes only, and that a subsequent act imposing an additional tax for county purposes is unconstitutional. *Kentucky Central R. Co. v. Bourbon* (Ky., Jan. 1885), 6 Kentucky Law Rep. 495.

When an exemption from taxation, total or partial, is claimed by a private corporation under its charter, or act of incorporation, the courts require that the legislative intent to confer such exemption shall be expressed in clear and unambiguous terms; and if there is a just and reasonable doubt as to such intent, it is resolved against the corporation.

Under the act incorporating the Mobile and Spring Hill Railroad Company, approved February 23, 1860 (Sess. Acts 1859-60, p. 265), while it is declared that, in consideration of the privileges thereby granted, "the property of the company, and capital actually paid in, shall at all times be liable the same rates of taxation as the property of individuals, and shall be taxed in no other way," the corporate authorities of the city of Mobile are authorized and empowered "to impose an annual taxation of one dollar on every one hundred dollars of the gross earnings of said company, which tax," it is declared, "shall be in full and in lieu of all taxation by said city on such railway, its rolling-stock, equipments, and appendages." *Held*, that these provisions indicate a clear legislative intent to exempt the corpo-

ration, to the extent specified, from all other municipal taxation expressly authorized. *Mobile, etc., R. Co. v. Kennerly*, 74 Ala.

The charter of a railroad company, granted in 1849, provided that its net income should be paid to the State as a tax, and other tax than herein is provided shall be levied or assessed on ration or any of their privileges, property, or franchises." *He* company was not liable to taxation under a general law for the railroads, enacted in 1881. *Maine v. Knox & L. R. Co.* (Maine, 4 East. Rep. 206.

The city of Los Angeles passed an ordinance which provided consideration of the benefits and advantages conferred upon and der city by the location of the passenger and freight depots for the city station of the main trunk line of the Southern Pacific R. city, etc., the city assigns certain stock to the defendant, and time provides that the defendant shall not as a consideration for be required to locate and build its depots and run the road to the less there shall be deeded to the company certain lands for dep and certain other land for work-shops and other buildings. quently passed another entitled "An ordinance providing a fr way for the Southern Pacific R. through the city of Los Angeles."

The ordinance, after reciting that by a certain ordinance passed 24, 1872, the city was obligated to give to defendant a free r through the city for its road, and that the defendant had sele streets, proceeds to set apart and dedicate to the unreserved and use of defendant such streets, for a right of way and to grant to the right of way over the same, for the uses and purposes of it. *Held*, that these ordinances did not constitute a contract that t of the defendant when established and prosecuted, or its proper be free from the burdens of taxation, or exempt from such li might be lawfully imposed upon other persons owning like p using it in like manner. *City of Los Angeles v. So. Pac. R. Co.* Aug. 1885), 7 West. Coast Rep. 416.

Same—Duty to Account as Means of ascertaining when Right accrues.—A provision in a railroad charter exempting the road ments from taxes until the income should amount to a certain p annum on the cost of construction and equipments implies an by the company to the State, showing the cost of construction ments and the annual receipts and expenditures of the road, as ascertaining when the right to tax it accrues. *St. Louis, etc. Berry*, 41 Ark. 512.

Same—Applies only to Lands used for Corporate Purpose.—tion from ordinary taxation declared by an act extends (as resp only to such lands as are held and used for the proper purposes poration, or to such as, although not in actual present use, are pared and appropriated to the purposes of the corporation by suc may be necessary. Lands which have ceased to be used for cor poses are taxable, whether the corporation rent the lands for u viduals, or suffer them to be wholly vacant. So, lands which been used, but are held for use at some future time, are taxable, is probable that they will be needed for such contemplated use. *Chicago, etc., R. Co.* (Minn., July, 1885), 24 N. W. Repr. 313.

Same—What Property exempt.—Property used for the actual sary purpose of the navigation of the Delaware & Raritan and for no other purpose, is within the exemption of the char company, which declares that no tax or impost shall be levied upon the property of the said company. *State v. Mayor* (New Jer 1886), 3 Atlantic Repr. 123.

Same—Effect as to Branch Roads subsequently acquired.—The exemption from taxation contained in the original charter of the Southwestern R. Co. does not, by mere implication, exempt branch roads subsequently acquired or built. *Southwestern R. Co. v. Wright* (Supreme Court U. S., Jan. 1886), 6 Sup. Ct. Rep. 375.

Same—Effect of Transfer or Consolidation.—Exemption from taxation granted to a railroad corporation is a personal privilege, incapable of transfer, and does not pass to the purchaser of the road under a mortgage. The exemption from taxation granted by charter to the Arkansas Midland R. Co., was lost by the subsequent consolidation of that company with the Little Rock & Helena R. Co., and forming the Central R. Co. *Arkansas Midland R. Co. v. Berry*, 44 Ark. 17.

The provision in the charter of the Memphis & Little Rock R. Co. authorizing the company to mortgage its charter and works, and exempting it from taxation, does not transfer the exemption to the purchasers under the mortgage. Exemption from taxation granted to a railroad corporation is not attached to the road and property and does not pass with it, but is a personal immunity and incapable of transfer without express statutory direction. *Memphis & L. R. R. Co. v. Berry*, 41 Ark. 436.

A railroad company, having obtained its charter under a general law, which the constitution of the State granting it declares to be subject to legislative alteration and amendment, and its certificate of incorporation being the conveyance to it by the name it has chosen, as a purchaser at a judicial sale and recorded as required, does not thereby succeed to the exemption from taxation accorded to the company to which it has succeeded by such purchase, so as to put it beyond the legislative power to subject its property to taxation thereafter without impairing the obligation of contracts. *Chesapeake & O. R. Co. v. Miller*, 114 U. S. 176.

A mortgage of the charter of a corporation, made in the exercise of a power given by statute, confers no right upon purchasers at a foreclosure sale to exist as the same corporation: if it confers any right of corporate existence upon them, it is only a right to reorganize as a corporation, subject to laws, constitutional and otherwise, existing at the time of the reorganization. The privilege of being exempt from taxation does not pass to the purchaser at such foreclosure sale. *Memphis, etc., R. Co. v. R. Comm'rs*, 113 U. S. 609.

The charter of a railroad company being given, exempting such company from taxation under certain circumstances, and thereafter a constitution being enacted in the State, according to which no corporation should be specifically relieved of taxation, the railroad company, upon being consolidated with another railroad, thereby losing its identity, should be liable for all the pains and penalties imposed by the respective charters of the several companies so consolidated. By the subsequent absorption of the railroad so exempted from taxation with another not so exempted it must be presumed that the original company, in entering into the consolidation, did so in full view of the existing law, and with the intention of forming a new corporation. *St. Louis, etc., R. Co. v. Berry*, 113 U. S. 465.

The Tennessee & Alabama R. Co. was incorporated by the legislature of Tennessee on the 23d of January, 1852, to build a railroad from Nashville, by the way of Franklin, to the line between Tennessee and Alabama, in the direction of Florence, Alabama. This company was granted by its charter "all the rights, powers, and privileges," and subjected to "all the liabilities and restrictions conferred and imposed upon the charter of the Nashville & Chattanooga R. Co." The Central Southern R. Co. was incorporated by the legislature of Tennessee on the 30th of November, 1853, to build a railroad from a point of intersection with the Tennessee & Alabama R. at

Columbia, by way of Pulaski, to the Alabama State line in the direction of Athens and Decatur, Alabama, to connect with any railroad that might be constructed from Decatur to the State line in the direction of Pulaski. This company also was given "all the powers and privileges" and subjected "to all the restrictions and liabilities, prescribed in the charter of the Nashville & Chattanooga R. Co." The Tennessee & Alabama Central R. Co. was incorporated by the legislature of Alabama on the 19th of December, 1858, to build a railroad from Montevideo, Alabama, in a northeasterly direction, through Decatur, to some point on the boundary between Alabama and Tennessee, to connect with a railroad leading through Pulaski to Columbia, Tennessee. This company was by its charter authorized "to unite and consolidate into one road all or such part of the said road with any railroad that may connect with the said Tennessee & Alabama Central R. at the Tennessee line." Each of these corporations completed its railroad in accordance with the requirements of its charter, and on the 19th of April, 1866, the legislature of Tennessee passed another act (Acts Tenn. 1865-66, pp. 217, 220), sections 5, 6, 9, and 10 of which are as follows:

"Sec. 5. Be it further enacted, that for the purpose of uniting and consolidating the Tennessee & Alabama R. Co. and the Central Southern R. Co. into one, the directors of said companies be, and they are hereby, authorized to agree upon the terms thereof, and to adopt all necessary and proper measures, agreements, and obligations to effect the same: provided, said terms of consolidation, when perfected by the directors of said companies, shall be submitted to a vote of the stockholders of said companies, and if assented to by a majority of the stockholders, the same shall be binding upon said companies; and that thereafter, and upon official report thereof to the president of the respective companies and the comptroller of the State, said consolidated and united companies shall be known and styled the 'Nashville & Decatur R. Co.,' by which name it shall sue and be sued, and be entitled to all the rights and privileges, and be subject to all the liabilities and restrictions, of a body corporate.

"Sec. 6. Be it further enacted, that the said Nashville & Decatur R. shall, for its government, be entitled to all the rights and privileges, and subject to all the restrictions and liabilities, conferred and imposed upon the Nashville & Chattanooga R. Co.: provided, that no State aid is intended to be extended to said Nashville & Decatur R.: and provided, further, that no new liability to the State of Tennessee is intended to be imposed hereby upon said Tennessee & Alabama R. Co. and the Central Southern R. Co."

"Sec. 9. Be it further enacted, that the Tennessee & Alabama R. and the Central Southern R., thus consolidated, may, through their directors thus elected, be consolidated with the Alabama & Tennessee Central R. upon such terms as may be agreed upon between them, and approved by the stockholders of said roads, to be hereafter known as the 'Nashville & Decatur R.,' such terms not to be in conflict in anywise with those herein contained, but may be supplementary or in addition thereto: provided, the consolidation herein provided for be approved by act of the legislature of the State of Alabama, heretofore or hereafter passed, and said railroad, thus consolidated, may, by their stockholders, regularly convened, upon thirty days' notice in the newspapers of Nashville and Huntsville, elect directors to serve them for the term of twelve months, and until their successors shall be elected.

"Sec. 10. Be it further enacted that the capital stock of said united companies shall be the aggregate amount of their respective charters, with the addition thereto of _____ dollars; and that this act shall take effect from and after its passage."

Under the authority of this act, and of section 22 of the act to incorpo-

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rate the Tennessee & Alabama Central Co., the three companies were "united and consolidated under the style of the 'Nashville & Decatur R.'" upon the terms indicated in the following resolution confirmed at a convention of the stockholders:

"Resolved, that under the authority delegated to the executive committee by the respective stockholders of the Tennessee & Alabama, Central Southern, and Tennessee & Alabama Central railroad companies, the committee have agreed that the capital stock of each company shall represent the value of its road, and that therefore each of the companies herein mentioned shall surrender to the Nashville & Decatur R. Co. all of its rights, franchises, and property; the Nashville & Decatur R. Co. assuming to pay all debts owing by the several companies, and being hereby especially pledged to protect all persons who have made themselves individually liable for the debts of any of the several companies; and that the stockholders of each company shall be entitled to, and receive credit for, the same amount of stock in the Nashville & Decatur R. Co. that they own in any of the several companies; these constituting and comprising the whole basis of settlement."

This union was afterwards confirmed and declared valid by the legislatures of Tennessee and Alabama. The capital stock of the Nashville & Decatur Co. is the aggregate of the stock of all three of the original companies. *Held*, that the legislature of Tennessee intended to give the new corporation in that State all the powers and privileges, including exemption from taxation, which the old corporations were entitled to. *State v. Whitworth*, (U. S. Sup. Ct., March, 1886), 6 Sup. Ct. Repr. 651.

Same—Land Grant—Failure to pay Cost of Survey.—Lands granted to the Northern Pacific R. Co. in Dakota are not subject to taxation until the cost of surveying and selecting them has been paid into the United States treasury by the company, although the road has been built before the levy of the tax. *No. Pacific R. Co. v. Rockne* (U. S. Sup. Ct., Dec. 1885), 6 Sup. Ct. Repr. 201.

Same—Land Grant—Effect of withholding Patents by Secretary of Interior.—Those portions of the lands granted to the Wisconsin Central R. Co. which were situated within the indemnity limits were, prior to the assignment complained of, duly selected by the proper party; and such selections duly certified to by the proper local United States land agents, and also by the governor of the State; a list of the lands so selected and so certified were presented to the Secretary of the Interior, and patents therefor requested; and all fees and charges thereon having been paid, or in effect tendered; and the Secretary of the Interior having refused to grant such patents on the sole ground that, upon his construction of a prior decision of the supreme court of the United States, the plaintiff had already received patents in excess of the lands granted, but which construction has recently been held by the same court to be unfounded; and there being no claim or pretence that such refusal was made on the ground that any of the lands in question were swamp lands, or lands to which the right of pre-emption or homestead had attached; or that any of them had been reserved for any other purpose, or sold or disposed of to any other corporation, or person; or that any other party was making any claim to any of them; or that the Secretary found any fault or made any objection to any of the selections so made and certified; or that there was any other ground for such refusal than the one stated,—it is *held* that such action and non-action of the Secretary of the Interior in the premises were equivalent to a recognition and acquiescence in the selections so made, certified, and presented to him; and, in effect, an approval and acceptance of the same by implication; and therefore that the plaintiff's equitable right to the lands so selected, certified, presented, approved, and accepted, thereby specific-

ally attached, and became certain in description, and hence lands were properly taxable in 1883. *Winconsin Cent. R. (Wisconsin, Dec. 1885), 26 N. W. Repr. 93*

Same—Contract construed to mean a Transfer of Exempt June, 1869, the St. Paul, etc., R. Co. entered into a contract with the Minnesota Construction Co. "for the construction and equipment of road from St. Paul to Winona, by the terms of which the latter obtained the necessary right of way, and build and equip the line and in consideration of such agreement the railway company transferred, and assigned to the construction company—first, \$3,000,000 mortgage land-grant bonds of the railroad company; second, \$3,000,000 whole issue to be limited to that amount) of special preferred stock of the railroad company, issued pursuant to Sp. Laws Minnesota, which should give the holders a preference from said railway company per cent per annum from the net earnings of the road, and absolute ownership of all the lands which had been or which should be granted to or acquired by the railway company in aid of the construction of the road; third, all their right, title, and interest in and to \$6,000,000 capital stock of the railway company; fourth, all donations, bounties, or aids in any form or shape which had been or after be made or given by any person, corporation, municipal corporation to aid in the construction of such railway; fifth, the railway company agreed to make and deliver to the construction company any and all documents and instruments in writing which the construction company should require or be advised by counsel as necessary or important to more effectually carry out the true intent and meaning of the contract.

Under this contract the construction company proceeded to build the road. In February, 1871, after the greater part of the road was completed, before it was completed, the construction company applied to the railway company, asking for a modification of the contract so as to allow the railway company to turn the \$3,000,000 special preferred stock to be cancelled, and in lieu thereof the railway company execute to it a mortgage upon the lands (the 462,000 acres) donated to aid in the construction of the road for \$3,000,000, with interest at 10 per cent. This modification was assented to and executed by the return and cancellation of the special preferred stock, and the execution of a mortgage on the lands for \$3,000,000, per cent. Only one bond or certificate of indebtedness was issued to represent the entire amount. *Held*, that the transaction between the railway company and the Minnesota Construction Co., although in form a mortgage, was in effect and substance to a conveyance of the lands in controversy, and that the same, although exempted from taxation in the company's charter, are subject to taxation within the meaning and spirit of the act. *St. Paul, etc., R. Co. v. McDonald (Minn., Oct. 15, 1885), 25 N. W. Repr. 100*

Same—Capital Stock.—Section 38 of the charter of Nashville, etc., R. Co. provided that "the capital stock of said company shall be forever exempt from taxation, and the road, with all its fixtures and appurtenances, including workshops, warehouses, and vehicles of transport, shall be exempt from taxation for the period of twenty years from the completion of the road, and no longer." *Held*, that the exemption of the stock in the hands of stockholders, the capital represented by the stock, has been converted into the fixtures and appurtenances of the road, which are still liable to taxation. *State of Tenn. v. Whitworth (Tenn., March, 1886), 6 Sup. Ct. Repr. 645*

Same—Right of State to tax Property situated on Land **General Government.**—In the act admitting Kansas as a State, it was provided that the reservation of Federal jurisdiction over the Fort Leavenworth

reservation. The State of Kansas subsequently ceded to the United States exclusive jurisdiction over the same, "saving further to said State the right to tax a railroad, bridge, or other corporations, their franchises and property within said reservation." *Held*, that the property and franchises of a railroad company within the reservation was liable to pay taxes in the State of Kansas, imposed according to its laws. *Ft. Leavenworth R. Co. v. Lowe*, 114 U. S. 525.

See, generally, *East Tenn., etc., R. Co. v. Hamblin Co.*, 2 Am. & Eng. R. Cas. 652; *Alexandria, etc., R. Co. v. Dist. of Col.*, 7 Ib. 325; *Louisville, etc., R. Co. v. Palmes*, 13 Ib. 380; *State v. Nashville, etc., R. Co.*, 17 Ib. 420; *Kentucky v. Owensborro, etc., R. Co.*, 17 Ib. 428; *Wilson v. Gaines*, 17 Ib. 627; *Louisville, etc., R. Co. v. Bates*, 17 Ib. 494; *Memphis, etc., R. Co. v. Loftus*, 13 Ib. 377; *Northern Pac. R. Co. v. Carland*, 17 Ib. 364; *Chicago, etc., R. Co. v. People*, 5 Ib. 94; *Winona, etc., R. Co. v. Denel Co.*, 7 Ib. 348; *Wisconsin Cent. R. Co. v. Lincoln Co.*, 13 Ib. 663.
See this subject thoroughly discussed by the United States Supreme Court in *Van Brocklin v. Anderson*, 12 Am. & Eng. Corp. Cas. 578.

PICKERD, Comptroller,

v.

PULLMAN SOUTHERN CAR CO.

(117 U. S. Supreme Court, 34.)

Section 6 of the act of the legislature of Tennessee, passed March 16, 1877, Laws of 1877, ch. 16, p. 26, which imposes a privilege tax of \$50 per annum on every sleeping car or coach used or run over a railroad in Tennessee and not owned by the railroad on which it is run or used, is void so far as it applies to the interstate transportation of passengers carried over railroads in Tennessee, into or out of or across that State, in sleeping cars leased by a corporation of Kentucky and leased by it for transportation purposes to Tennessee railroad corporations, the latter receiving the transit fare, and the former the compensation for the sleeping accommodations.

Is error to the Circuit Court of the United States for the Middle District of Tennessee.

J. B. Heiskell, Thos. L. Dodd, and S. A. Champion for plaintiff in error.

O. A. Lochrane and Edward S. Isham for defendant in error.

BLATCHFORD, J.—Section 28 of article 2 of the constitution of Tennessee of 1870 contains these provisions: "All property shall be taxed according to its value, that value to be ascertained in such manner as the legislature shall direct, so that taxes shall be equal and uniform through-

SECTION 28, ART.
2. CONSTITUTION
OF TENNESSEE.

out the State. No one species of property from which be collected shall be taxed higher than any other species of the same value. But the legislature shall have the power to tax merchants, peddlers, and privileges, in such manner as may from time to time direct." On the sixteenth of May, 1878, the legislature of Tennessee passed an act, entitled "An act declaring the mode and manner of valuing the property of railroad companies for taxation, and of taxing sleeping cars" (Laws of Tenn. c. 16, p. 26), the sixth section of which provided as follows:

ACT DECLARING
MODE OF TAXING
SLEEPING CARS.

"That the running and using of sleeping coaches on railroads in Tennessee, not owned by the State, shall be a privilege, and the companies owning and running said cars or coaches are required to report, on or before the first day of May of each year, to the comptroller, the number of said cars or coaches so used by them in this State; and they shall be required to pay to the comptroller by the first of July following \$50 for each of every of said cars or coaches used or as run over said railroads, if the said privilege tax herein assessed be not paid as required; and if the said comptroller shall enforce the payment of the same by writ of mandamus or by distress warrant." Under this act the comptroller of the State of Tennessee reported that there was due from the Pullman Southern Car Company, a corporation of Kentucky, to the State, for each of the years 1878, 1879, and 1880, a privilege tax of \$50 on each one of the 300 sleeping cars run and used on railroads in Tennessee, and not owned by the railroad companies on whose roads they were used but by the Pullman Co. The aggregate amount of the tax was \$5700, and the comptroller instituted proceedings to collect them from that company, which, under the provisions of the statute of the State, paid the money under protest, and deposited it into the State treasury, with notice to the comptroller that the same was paid under protest, and the company, within the time prescribed by the statute, and in August, 1881, brought an action against the comptroller to recover the \$5700, in the circuit court of the United States for the middle district of Tennessee.

The declaration alleges, among other things, that the company is the owner of the sleeping cars, for the running or use of which the taxes were collected, were not run or used by the plaintiff, or by any one of the years 1878, 1879, or 1880, but were run and used by certain railroad companies in Tennessee, which were owned during that time by the plaintiff, which contracted with those railroad companies to run and use them under contract stipulations; that the sleeping cars so run and used during the whole of the years 1878, 1879, and 1880, were employed in interstate commerce, being run into and through Tennessee, from and into other States, transporting passengers from other States into or across Tennessee, or from Tennessee into

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INGS.

ates; and that, therefore, such taxes and the collection thereof are illegal and contrary to the constitution of the United States. There was a demurrer to the declaration, raising, among other things, the question above stated, but, on a hearing, the demurrer was overruled, the opinion of the court being delivered by Mr. Justice Matthews. 22 Fed. Rep. 276. The conclusion arrived at in the opinion, which accompanies the record, was that the levying a privilege tax on the running and using, on railroads in Tennessee, of sleeping cars not owned by those railroads, was, as applied to such cars when employed in interstate transportation, a regulation of commerce among the States, and contrary to the constitution of the United States, and therefore void. Leave being given to the defendant to plead over, *nil debet* was pleaded, and the issue was tried by the court without a jury, by a written stipulation between the parties, which embodied an agreed statement of facts, on which the cause was heard. The agreed statement sets forth that the plaintiff is a Kentucky corporation, having its chief office and place of business at Louisville; and that, since 1872, it has been engaged at Louisville in manufacturing railway cars, known as drawing-room cars and sleeping cars, and in leasing those cars to various railroad companies in Tennessee and other States, under the following form of contract:

"This indenture, made this nineteenth day of June, A.D. 1872, between the Louisville & Nashville R. Co., the party of the first part, and the Pullman Southern Car Co. of the second part: Whereas, the said party of the second part is CONTRACT FOR HIRING CARS. now engaged in the business of manufacturing railway cars, known as drawing-room and sleeping cars, under certain patents belonging to them, and of hiring the same to railroad companies, and receiving therefor income and revenue by the sale to passengers of seats and berths, and accommodations therein; and whereas, the said party of the first part is desirous of availing itself of the use on and over its lines of road of the cars constructed under the sleeping and drawing-room car patents now the property of said second party, and also of connections by means of said cars with other lines of railroad, whereon said cars are now operated by said second party: Now this contract witnesseth that the said party of the second part, in consideration of the covenants and agreements of the party of the first part, hereinafter mentioned to be by them kept and performed, hereby agrees with the said party of the first part that they will furnish drawing-room cars and sleeping cars to be used by said party for the transportation of passengers, sufficient to meet the requirements of travel on and over their line of railroad, and on and over all lines of railroad which they now control, or may hereafter control, by ownership, lease, or otherwise, the said cars so furnished to be satisfactory to the general superintendent of the first party.

"(2) The said party of the second part agrees that keep the carpets, upholstery, and bedding of each of the cars in good order and repair, and renew and improve the same as necessary, at their own expense, excepting repairs and renewals made necessary by accident or casualty; it being understood that the said first party shall repair all damages to said cars of every kind, occasioned by accident or casualty during the continuance of this agreement.

"(3) The said party of the second part hereby agrees to pay, at their own expense and cost, to furnish one or more employees to be needed, upon each of said cars, whose duties shall be to collect fares for the accommodations furnished in said cars, and to wait upon passengers therein, and provide for their comfort.

"(4) The said party of the first part hereby agrees that the general officers of said second party, and the employees named in article third of this agreement, shall be entitled to free passage on the lines of the first party, when they are on duty for said second party.

"(5) The party of the second part hereby agrees that the general officers of the first party shall be entitled to free passage on the cars furnished by said second party under this agreement.

"(6) It is hereby mutually agreed that the said employees of the second party named in article third of this agreement shall be governed by and subject to the rules and regulations of the first party, which are or may be adopted from time to time by the government of their own employees, and, in the event of any liability arising against said first party for personal injury to any employee of said second party, it is distinctly understood and agreed that the said first party shall be liable only to the same extent they would be if the person injured was an employee in fact of said first party, and for all damages in excess thereof shall be indemnified and paid by said second party.

"(7) The party of the first part, in consideration of the aforesaid cars, hereby agrees to haul the same on the passenger trains on their line of road, and on all roads which they may now control or may hereafter control by ownership, lease, or otherwise, and also on all passenger trains on which they may, by virtue of contracts or running arrangements with other roads, have the use of such cars in such manner as will best accommodate the use of said cars; and the said party of the first part shall, at their own expense, furnish fuel for the cars and for the lights, shall wash and cleanse said cars, and shall keep said cars in good order and repair, including renewals of parts, and all things appertaining to said cars, necessary to keep them in first-class condition, except such as are provided for in article second of this agreement.

"(8) The party of the first part agrees to furnish said

second part, at convenient points, room and conveniences for sleeping and storing bedding.

"(9) The said party of the first part further agrees that the said party of the second part shall be entitled to collect from each and every person occupying said cars, such sums for said occupancy as may be usual on competing lines furnishing equal accommodations, and that such rules and regulations shall be agreed upon as will most favor the renting of seats and couches in said cars.

"(10) The party of the first part hereby agrees to permit the party of the second part to place their tickets for seats and couches for sale in such of the railroad ticket offices as may be desired by said second party, and such services shall be performed by and as part of the general duties of the ticket agents, and without charge to the party of the second part; proceeds of such sales to be at the risk of said second party.

"(11) The party of the first part hereby agrees that said second party shall have the exclusive right, for a term of fifteen years from the date hereof, to furnish for the use of the first party drawing-room or parlor cars and sleeping cars, including reclining-chair cars, on all the passenger trains of said first party, and over their tire lines of railroad, and on all railroads which they may control, and may hereafter control, by ownership, lease, or otherwise, and on all passenger trains on which they may, by virtue of contracts or running arrangements with other roads, have the right to use such cars, and that they will not contract with any other parties to run said class of cars on or over said lines of road during said period of fifteen years.

"The said second party, for the consideration aforesaid, hereby warrants said first party against all damages of whatsoever kind which may be by said first party incurred in consequence of any infringement of patent rights in the construction and use of any of said cars which may be used by said second party upon the lines of said first party under this arrangement; it being the meaning and intent of this article that the said second party shall secure said first party against all manner of expenditures which may be incurred by said first party in consequence of any litigation connected with alleged infringements of patent rights for the interior arrangements of said cars, and that they will pay off and discharge all judgments sustained at any time against said first party on account of such infringements.

"(12) It is mutually agreed between the parties hereto that in the event either of said parties shall at any time hereafter fail to keep and perform any of the covenants herein contained to be by them respectively kept and performed, then and in that case, after written notice shall have been given to the defaulting party thereto of the default complained of, if the said defaulting party shall refuse or neglect to make good, keep, and perform such unfulfilled cov-

enants and conditions of this agreement within a reasonable time after such notice, the other party shall be at liberty to demand the return of the contract ended, and no longer in force."

The agreed statement further sets forth that the plaintiff has never had any branch office or establishment of any kind in Tennessee, unless the fact that the plaintiff has issued tickets for sale with railway agents in that State constitutes the offices of such agents branch offices or establishments of the plaintiff; that it has never had any ticket agents of its own in Tennessee, except in so far as the ticket agents of the railroad companies with whom the tickets of the plaintiff have been placed for sale may be regarded as the agents of the plaintiff; that the plaintiff has never had any other agents, officers, or employees in Tennessee, except the conductors and porters which it furnishes on its cars under its contracts with the railroad companies for the use of cars furnished by the plaintiff under those contracts for the transportation of the property owned by it in Tennessee, and the business conducted by it under those contracts such as it is, is the only business conducted by it in Tennessee; that the cars furnished by it under those contracts (with the exception of two sleeping cars running between Nashville and Memphis) are used in transporting passengers from points in other States into or across Tennessee, and from points in Tennessee to other points in other States; that the same cars also transport passengers from points in Tennessee to other points in that State; that they properly apply for such transportation, but the rate of fare for such passengers bears an inconsiderable proportion to the rate of fare for passengers transported in those cars; that those cars run north, south, east, or west, or across Tennessee, making such stops as the train makes; that they are attached make; that in the case of passengers transported across Tennessee, or from points out of it to points in it, sleeping-car tickets are purchased and paid for before entering Tennessee, but in the case of passengers from points in Tennessee to points in other States, or in Tennessee, the tickets are purchased and paid for in Tennessee; that the railroad companies with whom such contracts were made were duly chartered under that State or organized or operated under its laws, with capital stock paid up, and authorized to transport passengers for hire; that they are taxed by that State on the value of their roads, rolling stock, and other tangible property, and also on the value of their franchises; that from 1877, to the present time, the Memphis & Charleston R. Co., the East Tennessee, Virginia & Georgia R. Co., both of which are Tennessee corporations, have owned sleeping cars which they have run and used during that time as sleeping cars upon their respective roads, and they have not been required by the State to pay a tax for running or using said sleeping cars upon their roads, in so far as such a tax may have been included in the tax on the value of their franchises; and that the 38 cars be-

tioned included the two cars run between Nashville and Memphis.

The agreed statement sets forth the other facts hereinbefore contained necessary to a recovery; and on the twenty-ninth of December, 1884, a judgment was entered, which states that the cause was heard on an agreed statement of facts, and that it is thereby made a part of the record at large in the cause, and that the court found the issue joined in favor of the plaintiff. It then sets forth the material facts contained in the agreed statement, and awards a judgment for \$5400, for the taxes on the 36 cars, and for \$1089.90 interest, and for costs, assigning as a reason that the State had no power to impose a privilege tax on the plaintiff for running or using the 36 cars in the State, the tax being a regulation of commerce between the States, and therefore a violation of the constitution of the United States. To reverse this judgment the defendant has sued out a writ of error.

The point upon which the final judgment was rendered in the case was the one considered and adjudged in the decision given on the demurrer to the declaration. The tax was not a property tax, because, under the constitution of Tennessee, all property must be taxed according to its value, and this tax was not measured by value, but was an arbitrary charge. What was done by the plaintiff was taxed as a privilege, it being assumed by the State authorities that the legislature had the power, under the constitution of Tennessee, to enact the sixth section of the act of 1877, and that the plaintiff had done what that section declared to be a privilege. By the decisions of the supreme court of Tennessee, cited in the opinion of the circuit court on the demurrer, it is held that the legislature may declare the right to carry on any business or occupation to be a privilege, to be purchased from the State on such conditions as the statute law may prescribe, and that it is illegal to carry on such business without complying with those conditions. In this case the payment of the tax imposed was a condition prescribed, without complying with which what was done by the plaintiff was made illegal. The tax was imposed as a condition precedent to the right of the plaintiff to run and use the 36 sleeping cars owned by it, as it ran and used them on railroads in Tennessee. The privilege tax is held by the supreme court of Tennessee to be a license tax, for the privilege of doing the thing for which the tax is imposed, it being unlawful to do the thing without paying the tax. What was done by the plaintiff in this case, in connection with the use of the 36 cars, wholly a branch of interstate commerce, was made by the State of Tennessee unlawful unless the tax should be paid, and, to the extent of the tax, a burden was placed on such commerce; and, on principle, the tax, if lawful, might equally well have been large enough to practically stop altogether the particular species of commerce.

TAX NOT A PROPERTY TAX. OCCUPATION TAXED AS A PRIVILEGE.

What was that commerce? The plaintiff, by its contract, furnished sleeping cars to the railroad company, to be used by "for the transportation of passengers," sufficient number to meet the requirements of travel on the line. The plaintiff kept in order and renewed the upholstery, and bedding of the cars, except renewals made necessary by accident or casualty, but all repairs to the cars by accident or casualty were repaired by the plaintiff company. The plaintiff furnished employees on each car as far as fares for the accommodations furnished by the car, and upon passengers and provide for their comfort. Those employees were governed by the rules adopted by the railroad company to govern its own employees, and the railroad company was not liable for personal injury to, or the death of, any such employee of the plaintiff to the same extent only as if such employee was in fact an employee of the railroad company, and the latter was indemnified by the plaintiff for all liability in excess thereof. The railroad company carried free on its line such employees of the plaintiff as general officers when on duty for it, and the plaintiff carried in the cars it so furnished the general officers of the railroad company. In consideration of the use of such cars, the railroad company hauled them on the passenger trains on its line in such manner as best accommodated passengers desiring to use them, and furnished, at its own expense, fuel for them, and materials, lights, and washed and cleaned them, and kept them in good repair, including renewals of worn-out parts, and apparatus appertaining to them necessary to keep them in first-class condition, with the exceptions before specified in regard to carpets, upholstery, and bedding, and furnished room and conveniences for all passengers storing bedding. The plaintiff collected from every person using the car compensation for its accommodations in the form of tickets for seats and couches on sale in the ticket offices of the railroad company, the sale to be a part of the general duties of the ticket agents of the latter, and to be without charge to the plaintiff, but the proceeds of sales to be at its risk. The contract was for an exclusive one for 15 years, and the plaintiff agreed to indemnify the railroad company against all liability for the infringement of any patent in the construction and use of the cars, and the plaintiff provided for the termination of the contract by either party in case of breach of it by the other.

On these facts, the cars in question were cars for the transportation of the passengers who occupied them, in their transit through, or out of Tennessee. They were used by the railroad company for such transportation, and it received the transportation compensation. For purposes of transit it dealt with the cars as it would with cars owned by itself. It hauled them, furnished

CONTRACT, BETWEEN RAILROAD AND SLEEPING CAR CO., DISTINCT LIABILITIES.

and materials for lights, washed and cleaned them, kept them in repair, renewed worn-out parts, repaired all damages to them by accident or casualty, and even repaired and renewed carpets, upholstery, and bedding damaged or destroyed by accident or casualty, all at its own expense, and without charge to the plaintiff; leaving the plaintiff only to make good the ordinary wear and tear of the sitting and sleeping conveniences, and allowing it to have the compensation for such conveniences, and furnishing it free of charge with all facilities for selling seats and couches.

The tax was a unit, with the privilege of the transit of the passenger and all its accessories. No distinction was made in the tax between the right of transit, as a branch of commerce TAX ONE ON RIGHT OF TRANSIT. between the States, and the sleeping and other conveniences which appertained to a transit in the car. The tax was really one on the right of transit, though laid wholly on the owner of the car. So, too, the service rendered to the passenger was a unit. The car was equally a vehicle of transit, as if it had been a car owned by the railroad company, and the special conveniences or comforts furnished to the passenger had been furnished by the railroad company itself. As such vehicle of transit the car, so far as it was engaged in interstate commerce, was not taxable by the State of Tennessee, because the plaintiff had no domicile in Tennessee, and was not subject to its jurisdiction for purposes of taxation, and the cars had no *situs* within the State for purposes of taxation, and the plaintiff carried on no business within the State, in the sense in which the carrying on of business in a State is taxable, by way of license or privilege.

The case of Attorney-General *v. London & N. W. R. Co.*, in the court of appeal (6 Q. B. Div. 216), before Lord Chief Justice Coleridge, and Lord Justices Baggallay and Brett, affirming the judgment of the exchequer division (5 Exch. Div. 47), is instructive in the above point of view as to the subject in hand. There the railway company attached to its night trains sleeping carriages for the accommodation of each of its first-class passengers as might choose to avail themselves of it. For the use of these carriages they were charged an extra sum in addition to the ordinary first-class fare. Besides couches with pillows, sheets, and blankets, each carriage contained a lavatory, and other conveniences. Passengers using such carriage were not disturbed during the night by demands for their tickets, and if they arrived at their destination in the night the passengers were allowed to remain in their beds until the morning. Under a statute imposing a percentage duty "upon all sums received or charged for the hire, fare, or conveyance of passengers" on any railway, the government claimed and was allowed the duty on the extra sum charged for the use of the sleeping carriage. The court of appeal, by Lord Coleridge, said: "We regard the additional

ATTORNEY-GENERAL *v.* LONDON, ETC., R. CO., COMPARED.

accommodation afforded by the sleeping carriages as did no essential particular from the superior accommodation by a second-class carriage over a third, or by a first-class over both. If the company issued tickets to all passengers at the price charged to passengers travelling in third-class and then issued tickets at corresponding prices to those to travel in a higher class of carriage, it could hardly be that duty would not be payable upon the prices paid for second ticket. The passenger who is content to travel in a first-class or second-class carriage in the day might well desire to travel in a carriage of a higher class by night; and, in like manner, a passenger ordinarily travelling by day in a first-class carriage might desire the additional accommodation at night of a sleeping car. No separate charge is made in the present case. The charge, though written on a separate ticket, is, in our opinion, a charge for the conveyance of the passenger in a particular way, and is, therefore, a part of the charge for the conveyance of the passenger received and charged for such conveyance." This is in harmony with the views before taken in regard to the present case. The fare paid by the interstate passenger to the railroad company, and that paid to the plaintiff, added together, are merely a charge for his conveyance in a particular way, and was really but one charge for the transit, though the total paid was divided among two recipients. The service was one, of interstate transit, with certain accommodations afforded, and what was paid to the plaintiff was part of a charge for the conveyance of the passenger.

The views above expressed are in harmony with numerous decisions which have been made by this court on the subject to which they relate. In *Almy v. State*, 24 Wall. 113, a stamp tax had been imposed by the State on bills of lading for the transportation of gold or silver from any point within the State to any point without it, and was held by this court to be invalid, and in *Woodruff v. Parham*, 8 Wall. 123, 138, it was held by this court, Mr. Justice Miller delivering its opinion, that a stamp tax "was a regulation of commerce, a tax imposed on the transportation of goods from one State to another, over land or seas, in conflict with the freedom of transit of goods and between one State and another, which is within the rule laid down in *Crandall v. Nevada*, 6 Wall. 35, and with the authority of Congress to regulate commerce among the States." In *Freight Tax Case*, 15 Wall. 232, 281, it was said that a tax on the transportation of passengers is beyond the reach of a State; and that a tax upon it amounts to a tax upon the property transported. In *Railroad Co. v. Maryland*, 21 Wall. 456, Mr. Justice Bradley, in speaking for the court, said that a State

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impose a tax or duty on the movements or operations of commerce between the States, because it would be a regulation of such commerce "in a manner which is essential to the rights of all, and therefore requiring the exclusive legislation of Congress," being "a tax because of the transportation," and "therefore virtually a tax on the transportation."

The decisions in the various cases in this court on the subject of a tax by a State on the bringing in of passengers from foreign countries, and which are collected and commented on by Mr. Justice Miller, in delivering the opinion of this court in the Head Money Cases, 112 U. S. 580, 591, show it to be a settled matter that to tax the transit of passengers from foreign countries or between the States is to regulate commerce.

The principles which governed the decisions in *Welton v. Missouri*, 91 U. S. 275, *Guy v. Baltimore*, 100 U. S. 434, and *Moran v. New Orleans*, 112 U. S. 69, holding unlawful the State taxes in those cases on interstate commerce in merchandise, are equally applicable to the tax in this case on the transit of passengers. The rule which governs the subject is accurately and tersely stated by Mr. Justice Field, in delivering the opinion of the court in *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 211: "While it is conceded that the property in a State belonging to a foreign corporation engaged in foreign or interstate commerce may be taxed equally with like property of a domestic corporation engaged in that business, we are clear that a tax or other burden imposed on the property of either corporation because it is used to carry on that commerce, or upon the transportation of persons or property, or for the navigation of the public waters over which the transportation is made, is invalid and void, as an interference with and an obstruction of the power of Congress in the regulation of such commerce." The case of *Telegraph Co. v. Texas*, 105 U. S. 460, in regard to a State tax on telegraphic messages sent out of a State, is a kindred case. The whole subject, in reference to a State tax imposed for selling goods brought into a State from other States, was recently fully considered by this court in *Walling v. Michigan*, 6 Sup. Ct. Rep. 454; and in that case Mr. Justice Bradley, speaking for the court, says: "We have also repeatedly held that so long as Congress does not pass any law to regulate commerce among the several States, it thereby indicates its will that such commerce shall be free and untrammelled." See *Welton v. Missouri*, 91 U. S. 275, 282; *Machine Co. v. Gage*, 100 U. S. 676, 678; *County of Mobile v. Kimball*, 102 U. S. 691, 697; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 196, 204; *Brown v. Houston*, 114 U. S. 622, 631, where the cases on that point are collected.

It is urged that the decision of the circuit court in this case was inconsistent with the rulings in *Osborne v. Mobile*, 16 Wall. 479,

and in *Wiggins Ferry Co. v. East St. Louis*, 107 U. S. becomes necessary, therefore, to examine those cases.

In *Osborne v. Mobile*, Osborne was an agent at Mobile, Ala. of a Georgia corporation, an express company, and as such acted at Mobile a general express business within and beyond the limits of Alabama. An ordinance of the city of Mobile required an annual license fee of \$500 to be paid by every express company doing business in Mobile, and having a branch extending beyond the limits of Alabama, while every company doing business within the limits of the State was required to pay a license fee of only \$100, and every such company doing business within the city was required to pay a license fee of \$50. A fine was prescribed for a violation of the ordinance. Osborne violated it, and was fined. The legality of the tax was held. Chief Justice Chase, in delivering the opinion of the court, cited the *State Freight Tax Case*, 15 Wall. 232, decided on the same term, as holding "that the State could not constitutionally impose and collect a tax upon the tonnage of freight carried within its limits and carried beyond them, or taken up beyond its limits and brought within them; that is to say, in other words, a tax upon interstate transportation;" "because it was in effect a tax upon interstate commerce, which by the constitution is to be signed to be entirely free." The tax on the Georgia Express was upheld as a tax "upon a business carried on within the limits of the State." Osborne was a local agent, personally subject to the taxing jurisdiction of the State, as representing his principal. The tax was on the general business he carried on, and the object of the tax was not, as here, the act of interstate transportation. In *Osborne v. Mobile* the court drew the distinction between the case before it and the *State Freight Tax Case*. The present case falls within the latter.

In *Wiggins Ferry Co. v. East St. Louis* the decision was that the State had power to impose a license fee upon a ferryman living in the State for boats which he owned and used in carrying passengers and goods across a navigable river to another State; and that the levying of a tax on such boats was an exaction of a license fee in respect of them, by the State. The fact that they had their *situs*, was not a regulation of commerce within the meaning of the constitution. In the case at bar the plaintiff was not a Tennessee corporation, and had no domicile in Tennessee. The sleeping cars in question, as before said, had not any connection with Tennessee for the purposes of taxation.

The question involved in this case was before the court in *Wiggins Ferry Co. v. East St. Louis*, and in *Osborne v. Mobile*. The majority of Tennessee in *Pullman Southern Car Co. v. Gaines*, 107 U. S. 587, on the same facts, as to the privilege tax for 1877, the court held (and it is stated that the supreme court of Tennessee on appeal, affirmed its ruling) that this privilege tax, as to

the cars as passed and repassed through the State and did not abide by it, was not amenable to the objection that it interfered with interstate commerce. The view taken was that the property of the foreign corporation used in Tennessee could be taxed as property by an excise on its use; and that the tax in this case was not directly on the object of commerce, or directly aimed at commerce. We have given to the views set forth by the Tennessee chancery court the consideration due to the judgments of that tribunal, but we are unable to concur in its conclusion. Judgment affirmed.

SANTA CLARA COUNTY *v.* SOUTHERN PACIFIC R. Co.

CALIFORNIA *v.* CENTRAL PACIFIC R. Co.

CALIFORNIA *v.* SOUTHERN PACIFIC R. Co.

(*U. S. Supreme Court Reports*, 394.)

The defendant corporations are persons within the intent of the clause in section 1 of the Fourteenth Amendment to the Constitution of the United States, which forbids a State to deny to any person within its jurisdiction the equal protection of the laws.

Under the constitution and laws of California, relating to taxation, fences erected upon the line between the roadway of a railroad and the land of coterminous proprietors are not part of "the roadway," to be included by the State Board in its valuation of the property of the corporation, but are "improvements" assessable by the local authorities of the proper county.

An assessment of a tax is invalid, and will not support an action for the recovery of the tax, if, being laid upon different kinds of property as a unit, it includes property not legally assessable, and if the part of the tax assessed on the latter property cannot be separated from the other part of it.

The State Board of Equalization of California were required by law to assess the franchise, roadway, etc., of all railroads operated in more than one county and apportion the same to the different counties in proportion to the number of miles of railway in each. They made such assessment of the Southern Pacific R., improperly including therein the fences between the roadway and the coterminous proprietor, and apportioned it and returned the same as required to the different counties. In a suit by one of the counties to recover its proportion of the tax levied in accordance with such apportionment and return, the court below, at the trial, found that "said fences were valued at \$300 per mile," which was the only finding on the subject; and it did not appear that the county, plaintiff, offered to take judgment for a sum including the rate on the value of the fences within the county at that valuation. *Held*, (1) That the finding was too vague and indefinite to serve as a basis for estimating the aggregate valuation of the fences included in the assessment, or the amount thereof apportioned to the respective counties; (2) That, under the circumstances, the court could not assume that the State Board included the fences in their assessment at the rate of \$300 per mile

for every mile of the railroad within the State, counting one or both the roadway; and could not, after eliminating that amount from the assessment, give judgment for the balance of the tax, if any.

ERROR to the Circuit Court of the United States for the district of California.

These actions, which were argued together, were brought to cover unpaid taxes assessed against the several railroad corporations defendants, under the laws of the State of California. The questions—almost the only—questions discussed by counsel in the arguments related to the constitutionality of the taxes. The court, in its opinion, passed by these questions, and decided the cases on the questions whether, under the constitution and laws of California, the fences on the line of the railroads should be valued and assessed, if at all, by the local officers, or by the State Board of Equalization; whether, on the record, the assessment and taxation upon the fences are separable from the rest of the assessment and taxation; and what was the effect of the record on the rights of the State and the county.

One of the points made and discussed at length in the arguments of counsel for defendants in error was that "Corporations are not within the meaning of the Fourteenth Amendment to the Constitution of the United States." Before argument. Mr. Justice WAITE said: "The court does not wish to hear argument on the question whether the provision in the Fourteenth Amendment to the Constitution, which forbids a State to deny to any person within its jurisdiction the equal protection of the law, applies to these corporations. We are all of opinion that it does."

D. M. Delmas and *A. L. Rhodes* for Santa Clara County.

E. C. Marshall, Attorney-General of California, for the plaintiffs in error.

S. W. Sanderson, *George F. Edmunds*, and *William L. ...* for defendants in error.

HARLAN, J.—These several actions were brought—the facts. In the Superior Court of Santa Clara County, California, and in the Superior Court of Fresno County, in the same State, for the recovery of certain county and State taxes, claimed by the defendants from the Southern Pacific R. Co. and the Central Pacific R. Co. under assessments made by the State Board of Equalization upon their respective franchises, roadways, road-beds, rails, and stock. In the action by Santa Clara County the amount claimed was \$13,366.53 for the fiscal year of 1882. For that sum, with five per cent penalty, interest at the rate of two per cent per month from December 27, 1882, cost of advertising, and ten per cent for attorney's fees, judgment is asked against the Southern Pacific R. Co. In the other action against the same company the amount claimed was \$5029.27 for the fiscal year of 1881, with five per cent a

non-payment of taxes and costs of collection. In the action against the Central Pacific R. Co, judgment is asked for \$25,950.50 for the fiscal year of 1881, with like penalty and costs of collection.

The answer in each case puts in issue all the material allegations of the complaint, and sets up various special defences, to which reference will be made further on.

With its answer the defendant, in each case, filed a petition, with proper bond, for the removal of the action into the Circuit Court of the United States for the District, as one arising under the Constitution and laws of the United States. The right of removal was recognized by the State court, and the action proceeded in the Circuit Court. Each case—the parties having filed a written stipulation waiving a jury—was tried by the court. There was a special finding of facts upon which judgment was entered in each case for the defendant. The general question to be determined is, whether the judgment can be sustained upon all, or either, of the grounds upon which the defendants rely.

The case as made by the pleadings and the special finding of facts is as follows:

By an act of Congress, approved July 27, 1866, 14 Stat. 292, the Atlantic & Pacific R. Co. was created, with power to construct and maintain, by certain designated routes, a continuous railroad and telegraph line from Springfield, Missouri, to the Pacific. For the purpose—which is avowed by Congress—of facilitating the construction of the line, and thereby securing the safe and speedy transportation of mails, troops, munitions of war, and public stores, right of way over the public domain was given to the company, and a liberal grant of the public lands was made to it. The railroad so to be constructed, and every part of it was declared to be a post route and military road, subject to the use of the United States for postal, military, naval, and all other government service, and to such regulations as Congress might impose for restricting the charges for government transportation. By the 18th section of the act, the Southern Pacific R. Co.—a corporation previously organized under a general statute of California, passed May 20, 1861, Stat. 1861, p. 607—was authorized to connect with the Atlantic & Pacific R. at such point, near the boundary line of that State, the former company deemed most suitable for a railroad to San Francisco, with “uniform gauge and rate of freight or fare with other roads;” and in consideration thereof, and “to aid in its construction,” the act declared that it should have similar grants of land, “subject to all the conditions and limitations” provided in the act of Congress, “and shall be required to construct its road in like regulations, as to time and manner, with the Atlantic & Pacific R.” §§ 1, 2, 3, 11, and 18.

In November, 1866, the Atlantic & Pacific R. Co. and the South-

ern Pacific R. Co. filed in the office of the Secretary of the State their respective acceptances of the act.

By an act of the legislature of California, passed April 18, 1871, to aid in giving effect to the act of Congress relating to the Texas Pacific R. Co., it was declared that:

"To enable the said company to more fully and completely with and perform the requirements, provisions, and conditions of the said act of Congress, and all other acts of Congress in force, or which may hereafter be enacted, the State of California hereby consents to said act, and the said company, its successors and assigns, are hereby authorized to change the line of its route as to reach the eastern boundary line of the State of California, such route as the company shall determine to be the most practicable, and to file new and amendatory articles of association, and the right, power, and privilege is hereby granted to, and vested in them to construct, maintain, and operate by steam or other power the said railroad and telegraph line in said acts of Congress, hereby confirming to, and vesting in said company, its successors and assigns, all the rights, franchises, power, and authority conferred upon, and granted to, and vested in said company by the said acts of Congress, and all acts of Congress which may be hereafter enacted."

Subsequently, by the act of March 3, 1871, 16 Stat. 577, Congress incorporated the Texas Pacific R. Co., with power to construct and maintain a continuous railroad and telegraph line from the eastern boundary of the State of Texas, to a point at or near El Paso, then in the Territory of New Mexico and Arizona to San Diego, pursuing, as near as practicable, the thirty-second parallel of latitude. To aid in its construction, Congress gave it, also, the right of way over the public lands, and made to it a liberal grant of public lands. The 18th section provided:

"That the Texas Pacific R. Co. shall be, and it is hereby made to be a military and post road; and for the purpose of its carrying of the mails, troops, munitions of war, supplies, and other property of the United States, no act of the company nor any act of the State or Territory shall impede, delay, or prevent the said company from performing its obligations to the United States in the said acts provided, that said road shall be subject to the use of the United States for postal, military, and all other governmental purposes, at fair and reasonable rates of compensation, not to exceed the rates paid by private parties for the same kind of service, and the said government shall at all times have the preference in the use of said road for the purpose aforesaid."

The twenty-third section of that act has special reference to the Southern Pacific R. Co., and is as follows:

"Sec. 23. That, for the purpose of connecting the Texas Pacific railroad with the city of San Francisco, the Southern

Co. of California is hereby authorized (subject to the laws of California) to construct a line of railroad from a point at or near Chacapa Pass, by way of Los Angeles, to the Texas Pacific railroad, at or near the Colorado River, with the same rights, grants, and privileges, and subject to the same limitations, restrictions, and conditions, as were granted to said Southern Pacific R. Co. of California by the act of July twenty-seven, eighteen hundred and sixty-six; provided, however, that this section shall in no way affect or impair the rights, present or prospective, of the Atlantic & Pacific Co., or any other railroad company."

Under the authority of this legislation, Federal and State, the Southern Pacific R. Co. constructed a line of railroad from San Francisco, connecting with the Texas & Pacific R. (formerly the Texas Pacific R.) at Sierra Blanca, in Texas; and with other railroads it is operated as one continuous line (except for that part of the route occupied by the Central Pacific R.) from Marshall, Texas, to San Francisco. It is stated in the record that the Southern Pacific R. Co. of California, since the commencement of this action, has completed its road to the Colorado River, at or near the Needles, to connect with the Atlantic & Pacific R., and that with the latter road it constitutes a continuous line from Springfield, Missouri, to the Pacific, except as to the connection, a relatively short distance, over the road of the Central Pacific Co.

On the 17th of December, 1877, the said Southern Pacific R. Co., and other railroad corporations, then existing under the laws of California, were legally consolidated, and a new corporation thereby formed, under the name of the Southern Pacific R. Co., the present defendant in error, 59.30 miles of whose road is in Santa Clara County and 17.93 miles in Fresno County.

On the 1st of April, 1875, this company was indebted to divers persons in large sums of money advanced to construct and equip the road. To secure that indebtedness, it executed on that day a mortgage for \$32,520,000 on its road, franchises, rolling-stock and improvements, and on a large number of tracts of land, in different counties of California, aggregating over eleven million acres. These lands were granted to the company by Congress under the above-mentioned acts, and are used for agricultural, grazing, and other purposes not connected with the business of the railroad. Of these patented, 3138 acres are in Santa Clara County and 18,789 acres in Fresno County. When these proceedings were instituted a part of its above mortgage debt had been paid, except the accrued interest and \$1,632,000 of the principal, leaving outstanding against it \$30,898,000.

In the year 1852 California, by legislative enactment, granted a right of way through that State to the United States for the purpose of constructing a railroad from the Atlantic to the Pacific

by confirming to and vesting in said company all the rights, privileges, franchises, power, and authority conferred upon, granted to, and vested in said company by said act of Congress, hereby repealing all laws and parts of laws inconsistent or in conflict with the provisions of this act, or the rights and privileges herein granted."

In 1870, the Central Pacific R. Co. of California and the Western Pacific R. Co. formed themselves into one corporation under the name of the Central Pacific R. Co., the defendant in one of these actions, 61.06 miles of whose road is in Fresno County. The company complied with the several acts of Congress, and there is in operation a continuous line of railway from the Missouri River to the Pacific Ocean, the Central Pacific R. Co. owning and operating the portion thereof between Ogden, in the Territory of Utah, and San Francisco.

When the present action was instituted against this company, the United States had and now have a lien, created by the acts of Congress of 1862 and 1864, for \$30,000,000, with a large amount of interest, upon its road, rolling-stock, fixtures and franchises; and there were also outstanding bonds for a like amount issued by the company prior to January 1, 1875, and secured by a mortgage upon the same property.

Such were the relations which these two companies held to the United States and to the State when the assessments in question were made for the purposes of taxation.

It is necessary now to refer to those provisions of the constitution and laws of the State which, it is claimed, sustain these assessments.

The constitution of California, adopted in 1879, exempts from taxation growing crops, property used exclusively for CONSTITUTIONAL PROVISIONS. public schools, and such as may belong to the United States, or to that State, or to any of her county or municipal corporations, and declares that the legislature "may provide, except in the case of credits secured by mortgage or trust deed, for a reduction from credits of debts due to *bona fide* residents" of the State. It is provided in the first section of Article XIII. that, with these exceptions—"all property in the State, not exempt under the laws of the United States, shall be taxed in proportion to its value, to be ascertained as provided by law. The word 'property,' as used in this article and section, is hereby declared to include moneys, credits, bonds, stocks, dues, franchises, and all other matters and things, real, personal, and mixed, capable of private ownership."

The fourth section of the same article provides :

"A mortgage, deed of trust, contract, or other obligation by which a debt is secured, shall, for the purposes of assessment and taxation, be deemed and treated as an interest in the property

affected thereby. Except as to railroad and other corporations, in case of debts so secured, the value of property affected by such mortgage, deed of trust, contraction, less the value of such security, shall be assessed to the owner of the property, and the value of such security shall be assessed and taxed to the owner thereof, in the county and district in which the property affected thereby is situated. The taxes so levied shall be a lien upon the property and security, and may be paid by either party to such security; if paid by the owner of the security, the tax so levied upon the property and security thereby shall become a part of the debt so secured; if paid by the owner of the property shall pay the tax so levied on such security, it shall constitute a payment thereon, and to the extent of such payment shall constitute a full discharge thereof: provided, that if any such indebtedness shall be paid by any such debtor or defaulting party, the assessment and before the tax levy, the amount of such indebtedness may likewise be retained by such debtor or debtors, and the tax so levied shall be completed according to the tax levy for the preceding year.

The ninth section makes provision for the election of a State Board of Equalization, "whose duty it shall be to equalize the valuation of the taxable property of the several counties of the State for the purpose of taxation." The boards of supervisors of the several counties constitute boards of equalization for their respective counties, and they equalize the valuation of the taxable property therein for purposes of taxation—assessments made by the State or county boards, to "conform to the true and correct money of the property" contained in the assessment rolls.

The tenth section declares:

"All property, except as hereinafter in this section provided, shall be assessed in the county, city, township, or district in which it is situated, in the manner provided by law. The franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county in this State shall be assessed by the State Board of Equalization at their true value, and the same shall be apportioned to the counties, cities, towns, townships, and districts in which the property is located, in proportion to the number of miles of road laid in such counties, cities and counties, cities, towns, townships, and districts."

The assessments in question, it is contended, were made in conformity with these constitutional provisions. The defendant claims that what is known as § 3664 of the Political Code of California. That section made it the duty of the State Board of Equalization, on or before the first Monday in May in each year, to "assess the franchise, roadway, road-bed, rails, and rolling stock of all railroads operated in more than one county—to which the assessments were levied on the defendants. It required every corporation of

by certain officers, or by such officer as the State Board should designate, to furnish the board with a sworn statement showing, among other things, in detail, for the year ending March 1, the whole number of miles of railway owned, operated, or leased by it in the State, the value thereof per mile, and all of its property of every kind located in the State; the number and value of its engines, passenger, mail, express, baggage, freight, and other cars, or property used in operating and repairing its railway in the State, and on railways which are parts of lines extending beyond the limits of the State. It is also directed that "the said property shall be assessed at its actual value;" that the "assessment shall be made upon the entire railway within the State, and shall include the right of way, road-bed, track, bridges, culverts, and rolling-stock;" and that "the depots, station grounds, shops, buildings, and gravel beds shall be assessed by the assessors of the county where situated, and other property." It further declares:

"On or before the fifteenth day of May, in each year, said board shall transmit to the county assessor of each county through which any railway, operated in more than one county, may run, a statement showing the length of the main track or tracks of such railway within the county, together with a description of the whole of said tracks within the county including the right of way by metes and bounds, or other description sufficient for identification, and the assessed value per mile of the same, as fixed by a *pro rata* distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway, within this State. Said statement shall be entered on the assessment roll of the county. At the first meeting of the Board of Supervisors, after such statement is received by the county assessor, they shall make and cause to be entered in the proper record-book an order stating and declaring the length of the main track, and the assessed value of such railway lying in each city, town, township, school district, or lesser taxing district in their county, through which such railway runs, as fixed by the State Board of Equalization, which shall constitute the taxable value of said property for taxation purposes in such city, town, township, school, road, or other district." Stat. Cal. 1881, ch. 73, § 1, page 82.

These companies, within due time, filed with the State Board the detailed statement required by that section.

At the trials below, no record of assessment against the respective defendants, as made by the State Board, was given in evidence, and there was introduced no written evidence of the assessment except an official communication from the State Board to each of the assessors of Santa Clara and Fresno counties, called, in the special findings, the assessment roll for the particular county. The roll for Fresno County, in 1881, relating to the Southern Pacific R. Co., is as follows:

DETAILED
STATEMENT
FILED WITH
STATE BOARD.

Original.—Assessment Book of the Property of Fresno County for 1881. Assessed to all known owners or claimants, and when unknown owners or claimants.

Taxpayer's Name.	DESCRIPTION OF PROPERTY.	Value of the franchise, roadway, road-beds, rails, and rolling-stock of railroads as apportioned to the county by the State Board of Equalization.	Total value of all property after deductions (Changes by the county boards of equalization to be noted in red ink.)	Total value after equalization by the State Board of Equalization.
Southern Pacific R. Co.	<p style="text-align: center;">OFFICE OF THE STATE BOARD OF EQUALIZATION, SACRAMENTO, May 14, 1881. }</p> <p>To W. H. MCKENZIE, Assessor of Fresno County.</p> <p>SIR: The State Board of Equalization on the 2d day of May, 1881, assessed for the year 1881 the Southern Pacific R. Co. for its franchise, roadway, road-bed, rails, and rolling-stock, in the State of California, in the aggregate sum of \$11,739,915.</p> <p>The entire line of main track of said railroad of said company in the said State is 711.51 miles.</p> <p>The length of the main track of said railway in Fresno County is 17.93 miles.</p> <p>The description of the whole of the main track of the railway of the said Southern Pacific R. Co., and the right of way for the same, in the county of Fresno, is as follows: Beginning at the town of Huron and running easterly in the direction of Goshen, in Tulare County, to the east line of Fresno County. The assessed value per mile of said railway, as fixed by a <i>pro rata</i> distribution per mile of the assessed value of the whole franchise, roadway, road-bed, rails, and rolling-stock of such railway of the said company within this State is \$16,500. The apportionment of the assessment of the said franchise, roadway, road-beds, rails, and rolling-stock, by this board, for and to Fresno County, is \$295,845.</p> <p style="text-align: right;">WARREN DUTTON, Chairman, M. M. DREW, D. M. KENFIELD, T. D. HEISKELL, State Board of Equalization. E. W. MASLIN, Clerk.</p>	\$ 295,845	\$ 602,869	\$ 602,869

(Duly certified by the Auditor.)

There were similar rolls in reference to the Central in the same county, for the same year, and the Southern in Santa Clara County for 1882. For each of those board of supervisors of the respective counties made an apportionment of the taxes among the legal subdivisions of such

It is stated in the findings that the delinquent lists for those years, so far as they related to the taxes in question, were duly made up in form corresponding with the original assessment roll; that in pursuance of § 3738 of the Political Code of California, the board of supervisors of the respective counties duly passed an order, entered on the minutes, dispensing with the duplicate assessment roll for that year; that the controller of the State transmitted a letter to the tax collector of the county, in pursuance of the provisions of § 3899 of that Code, directing him to offer the property for sale but once, and if there were no *bona-fide* purchasers to withdraw it from sale; that the tax collector, in obedience to the provisions of that section, transmitted to the controller, with his endorsement thereon of the action had in the premises, a certified copy of the entry upon the delinquent list relating to the tax in question in these several actions; that such endorsement shows that the tax collector had offered the property for sale and had withdrawn it because there was no purchaser for the same; and that the controller, in pursuance of the provisions of the same section, transmitted to the tax collector of the county a letter directing him to bring suit.

DELINQUENT
LISTS.

In each case there were, also, the following findings:

"The State Board of Equalization, in assessing said value of said property to and against defendant, assessed the full cash value of said railroad, roadway, road-bed, rails, rolling-stock, and franchises, without deducting therefrom the value of the mortgage, or any part thereof, given and existing thereon as aforesaid, to secure the indebtedness of said company to the holders of said bonds, notwithstanding they had full knowledge of the existence of the said mortgage; and in making said assessment the said State Board of Equalization did not consider or treat said mortgage as an interest in said property, but assessed the whole value thereof to the defendant, in the same manner as if there had been no mortgage thereon."

"The State Board of Equalization, in making the supposed assessment of said roadway of defendant, did knowingly and designedly include in the valuation of said roadway the value of fences erected upon the line between said roadway and the land of coterminous proprietors. Said fences were valued at \$300 per mile."

The special grounds of defence by each of the defendants were:

That its road is a part of a continuous postal and military route, constructed and maintained under the authority of the United States, by means in part obtained from the general Government; that the company having, with the consent of the State, become subject to the requirements, conditions, and provisions of the acts of Congress, it thereby ceased to be merely a State corporation, and became one of the agencies

DEFENDANTS'
GROUNDS OF DE-
FENCE—POSTAL
AND MILITARY
ROUTE.

or instrumentalities employed by the general government to execute its constitutional powers; and that the franchise to operate a postal and military route for the transportation of troops, munitions of war, public stores, and the mails, being derived from the United States, cannot, without their consent, be subjected to State taxation. 2. That the provisions of the constitution and laws of

**FOURTEENTH
AMENDMENT OF
CONSTITUTION.** California, in respect to the assessment for taxation of the property of railway corporations operating railroads in more than one county, are in violation of the Fourteenth Amendment of the Constitution, in so far as they require the assessment of their property at its full money value, without making deduction, as in the case of railroads operated in one county, and of other corporations, and of natural persons, for the value of the mortgages covering the property assessed; thus imposing upon the defendant unequal burdens, and to that extent denying to it the equal protection of the laws. 3. That what is known as § 3664 of the Political Code of California, under the authority of which in part the assessment was made, was not constitutionally enacted by the legislature, and had not the force of law. 4. That no valid assessment appears in fact to have been made by the State Board. 5. That no interest is recoverable in this action until after judgment. 6. That the assessment upon which the action is based is void, because it included property which the State Board of Equalization had no jurisdiction, under any circumstances, to assess, and that, as such illegal part was so blended with the balance that it cannot be separated, the entire assessment must be treated as a nullity.

The record contains elaborate opinions stating the grounds upon which judgments were ordered for the defendants. Mr. Justice Field overruled the first of the special defences above named, but sustained the second. The circuit judge, in addition, held that § 3664 of the Political Code had not been passed in the mode required by the State Constitution, and, consequently, was no part of the law of California. These opinions are reported as *The Santa Clara R. Tax Case*, in 9 Sawyer, 165, 210.

The propositions embodied in the conclusions reached in the Circuit Court were discussed with marked ability by counsel who appeared in this court for the respective parties. Their importance cannot well be overestimated; for they not only involve a construction of the recent amendments to the National Constitution in their application to the Constitution and the legislation of a State, but upon their determination, if it were necessary to consider them, would depend the system of taxation devised by that State for raising revenue, from certain corporations, for the support of her government. These questions belong to a class which this court should not decide, unless their determination is essential to the disposal of the case in which they arise.

Whether the present cases require a decision of them depends upon the soundness of another proposition, upon which the court below, in view of its conclusions upon other issues, did not deem it necessary to pass. We allude to the claim of the defendant, in each case, that the entire assessment is a nullity, upon the ground that the State Board of Equalization included therein property which it was without jurisdiction to assess for taxation.

The argument in behalf of the defendant is: That the State Board knowingly and designedly included in its assessment of "the franchise, roadway, road-bed, rails, and rolling-stock" of each company, the value of the fences erected upon the line between its roadway and the land of coterminous proprietors; that the fences did not constitute a part of such roadway, and, therefore, could only be assessed for taxation by the proper officer of the several counties in which they were situated; and that an entire assessment which includes property not assessable by the State Board against the party assessed is void, and, therefore, insufficient to support an action, at least, when—and such is claimed to be the case here—it does not appear with reasonable certainty, from the face of the assessment or otherwise, what part of the aggregate valuation represents the property so illegally included therein.

DEPENDANTS'
ARGUMENT.

If these positions are tenable, there will be no occasion to consider the grave questions of constitutional law upon which the case was determined below; for, in that event, the judgment can be affirmed upon the ground that the assessment cannot properly be the basis of a judgment against the defendant.

That the State Board purposely included in its assessment and valuation the fences erected on the line between the INCLUSION OF
FENCES IN AS-
SESSMENT. railroads and the lands of adjacent proprietors, at the rate of \$300 per mile, is undoubtedly true: for it is so stated in the special finding of facts, and that finding must be taken here to be indisputable. It is equally true that that tribunal has no general power of assessment, but only jurisdiction to assess "the franchise, roadway, road-bed, rails, and rolling-stock" of railroad corporations operating roads in more than one county, and that all other property of such corporations, subject to taxation, is assessable only "in the county, city, city and county, town, township, or district, in which it is situated, in the manner prescribed by law." Such is the declaration of the State constitution. *People v. Sacramento County*, 59 Cal. 321, 324; Art. XIII. § 10. It must also be conceded that "fences," erected on the line between these railroads and the lands of adjoining proprietors, were improperly included by the State Board in its assessments, unless they constituted a part of the "roadway." Some light is thrown upon this question by that clause of § 3664 of the Political Code of California—which, in the view we take of these cases, may be regarded as having been

legally enacted—providing that “the depots, station grounds, shops, buildings, and gravel beds” shall be assessed in the county where situated as other property. From this it seems that there is much of the property daily used in the business of a railroad operated in more than one county that is not assessable by the State board, but only by the proper authorities of the municipality where it is situated. So that, even if it appeared that the fences assessed by the State board were the property of the railroad companies, and not of the adjoining proprietors, they could not be included in an assessment by that board unless they were part of the roadway itself; for, as shown, the jurisdiction of that board is restricted to the assessment of the “franchise, roadway, road-bed rails, and rolling-stock.” We come back, then, to the vital inquiry whether the fences could be assessed under the head of roadway. We are of opinion that they cannot be regarded as part of the roadway for purposes of taxation.

The Constitution of California provides that “land and improvements thereon shall be separately assessed.” Art. XIII, § 2; and,

although that instrument does not define what are improvements upon land, the Political Code of the State expressly declares that the term “improvements”

includes “all buildings, structures, fixtures, fences, and improvements erected upon or affixed to the land.” § 3617. It would seem from these provisions that fences erected upon the roadway, even if owned by the railroad company, must be separately assessed as “improvements,” in the mode required in the case of depots, station grounds, shops, and buildings owned by the company; namely, by local officers in the county where they are situated. The same considerations of public interest or convenience upon which rest existing regulations for the assessment of depots, station grounds, shops, and buildings of a railroad company operated in more than one county, would apply equally to the assessment and valuation for taxation of fences erected upon the line of roadway of the same company.

In *San Francisco & North Pacific R. Co. v. State Board of Equalization*, 60 Cal. 12, 34, which was an application, on *certiorari*, to annul certain orders of the State Board assessing the property of a railroad corporation, one of the questions was as to the meaning of the words “road-bed” and “roadway.” The court there said: “The road-bed is the foundation on which the superstructure of a railroad rests. Webster. The roadway is the right of way, which has been held to be the property liable to taxation. Appeal of N. B. & M. R. Co., 32 Cal. 499. The rails in place constitute the superstructure resting upon the road-bed.” This definition was approved in *San Francisco v. Central Pacific R. Co.*, 63 Cal. 467, 469. In the latter case the question was whether certain steamers owned by the railroad

“LAND AND IMPROVEMENTS”—PROVISIONS OF CONSTITUTION.

REVIEW OF AUTHORITIES.

company, upon which were laid railroad tracks, and with which its passenger and freight cars were transported from the eastern shore of the bay of San Francisco to its western shore, where the railway again commenced, were to be assessed by the city and county of San Francisco, or by the State Board of Equalization. The contention of the company was that they constituted a part of its road-bed or roadway, and must, therefore, be assessed by the State Board. But the Supreme Court of the State held otherwise. After observing that all the property of the company, other than its franchise, roadway, road-bed, rails, and rolling-stock, was required by the Constitution to be assessed by the local assessors, the court said: "They are certainly not the franchise of the defendant corporation. They may constitute an element to be taken into the computation to arrive at the value of the franchise of such corporation, but they are not such franchise. It is equally as clear that they are not rails or rolling-stock. . . . Are they, then, embraced within the words roadway or road-bed, in the ordinary and popular acceptance of such words as applied to railroads? These two words, as applied to common roads, ordinarily mean the same thing, but as applied to railroads their meaning is not the same. The road-bed referred to in § 10, in our judgment, is the bed or foundation on which the superstructure of the railroad rests. Such is the definition given by both Worcester and Webster, and we think it correct. The roadway has a more extended signification as applied to railroads. In addition to the part denominated road-bed, the roadway includes whatever space of ground the company is allowed by law in which to construct its road-bed and lay its track. Such space is defined in subdivision 4 of the 17th section and the 20th section of the act 'to provide for the incorporation of railroad companies,' etc., approved May 20, 1861. Stat. 1861, p. 607; *S. F. & N. P. R. Co. v. State Board*, 60 Cal. 12."

The argument in support of the proposition that these steamers—constituting, as they did, a necessary link in the line of the company's railway, and upon which rails were actually laid for the running of cars—were a part either of the road-bed or roadway of the railroad, is much more cogent than the argument that the fences erected upon the line between a roadway and the lands of adjoining proprietors are a part of the roadway itself. It seems to the court that the fences in question are not, within the meaning of the local law, a part of the roadway for purposes of taxation; but are "improvements" assessable by the local authorities of the proper county, and, therefore, were improperly included by the State Board in its valuation of the property of the defendants.

The next inquiry that naturally arises is, whether the different kinds of property assessed by the State Board are distinct and separable upon the face of the assessment, so that the company being thereby informed of the amount of ASSESSMENT BY STATE BOARD. taxes levied upon each could be held to have been in default in

not tendering such sum, if any, as was legally due? Upon the transcript before us, this question must be answered in the negative. No record of assessment, as made by the State Board, was introduced at the trial, and presumably no such record existed. Nor is there any documentary evidence of such assessment, except the official communication of the State Board to the local assessors, called, in the findings, the assessment roll of the county. That roll shows only the aggregate valuation of the company's franchise, roadway, road-bed, rails, and rolling-stock in the State; the length of the company's main track in the State; its length in the county; the assessed value per mile of the railway as fixed by the *pro rata* distribution per mile of the assessed value of its whole franchise, roadway, road-bed, rails, and rolling-stock in the State; and the apportionment of the property so assessed to the county.

It appears, as already stated, from the evidence, that the fences were included in the valuation of the defendants' property; but under what head, whether of franchise, roadway, or road-bed, does not appear. Nor can it be ascertained, with reasonable certainty, either from the assessment roll or from other evidence, what was the aggregate valuation of the fences, or what part of such valuation was apportioned to the respective counties through which the railroad was operated. If the presumption is that the State board included in its valuation only such property as it had jurisdiction under the State constitution to assess, namely, such as could be rightfully classified under the heads of franchise, roadway, road-bed, rails, or rolling-stock, that presumption was overthrown by proof that it did, in fact, include, under some one or more of those heads, the fences in question. It was then incumbent upon the plaintiff, by satisfactory evidence, to separate that which was illegal from that which was legal—assuming, for the purposes of this case only, that the assessment was, in all other respects, legal—and thus impose upon the defendant the duty of tendering, or enable the court to render judgment for, such amount, if any, as was justly due. But no such evidence was introduced. The finding that the fences were valued at \$300 per mile is too vague and indefinite as a basis for estimating the aggregate valuation of the fences included in the assessment, or the amount thereof apportioned to the respective counties. Were the fences the property of adjacent proprietors? Were they assessed at that rate for every mile of the railroad within the State? Were they erected on the line of the railroad in every county through which it was operated, or only in some of them? Wherever erected, were they assessed for each side of the railway, or only for one side? These questions, so important in determining the extent to which the assessment included a valuation of the fences erected upon the line between the railroad and coterminous proprietors, find no solution in the record presented to this court.

FENCES—IN-
CLUDED
VALUATION.

If it be suggested that, under the circumstances, the court might have assumed that the State Board included the fences in their assessment, at the rate of \$300 per mile for every mile of the railroad within the State, counting one or both sides of the roadway, and, having thus eliminated from the assessment the aggregate so found, given judgment for such sum, if any, as, upon that basis, would have been due upon the valuation of the franchise, road-bed, roadway, rails, and rolling-stock of the defendant, the answer is that the plaintiff did not offer to take such a judgment; and the court could not have rendered one of that character without concluding the plaintiff hereafter, and upon a proper assessment, from claiming against the defendant taxes for the years in question, upon such of its property as constituted its franchise, roadway, road-bed, rails, and rolling-stock. The case as presented to the court below was, therefore, one in which the plaintiff sought judgment for an entire tax arising upon an assessment of different kinds of property as a unit—such assessment including property not legally assessable by the State Board, and the part of the tax assessed against the latter property not being separable from the other part. Upon such an issue, the law, we think, is for the defendant; an assessment of that kind is invalid and will not support an action for the recovery of the entire tax so levied. *Cooley on Taxation*, 295-6, and authorities there cited; *Libby v. Burnham*, 15 Mass. 144, 147; *State Randolph, etc., v. City of Plainfield*, 38 N. J. Law (9 Vroom), 93; *Gamble v. Witty*, 55 Mississippi, 26, 35; *Stone v. Bean*, 15 Gray, 42, 45; *Moshier v. Robie*, 11 Maine (2 Fairfield), 137; *Johnson v. Colburn*, 36 Vt. 695; *Wells v. Burbank*, 17 N. H. 393, 412.

It results that the court below might have given judgment in each case for the defendant upon the ground that the assessment, which was the foundation of the action, included property of material value, which the State Board was without jurisdiction to assess, and the tax levied upon which cannot, from the record, be separated from that imposed upon other property embraced in the same assessment. As the judgment can be sustained upon this ground, it is not necessary to consider any other questions raised by the pleadings and the facts found by the court.

ASSESSMENT BY
STATE BOARD OF
PROPERTY OF
MATERIAL VALUE
NOT VALID.

It follows that there is no occasion to determine under what circumstances the plaintiffs would be entitled to judgment against a delinquent tax-payer for penalties, interest, or attorney's fees; for if the plaintiffs are not entitled to judgment for the taxes arising out of the assessments in question, no liability for penalties, interest, or attorney's fees could result from a refusal or failure to pay such taxes.

Judgment affirmed.

California v. Northern R. Co. Error to the Circuit the United States for the District of California. The this case are substantially those which appear in County Clara, etc. v. Railroad Companies, just decided. For the given in the opinion in that case, and upon the ground stated, the judgment is

Affirmed.

SAN BERNARDINO COUNTY

v.

SOUTHERN PACIFIC R. Co.

This case differs from Santa Clara County v. Southern Pacific ante 523, only in this: that after entry of judgment defendant b the taxes claimed under a stipulation that the payment should be prejudice to the right of the plaintiff in the case to proceed for interest, and attorney's fees claimed." *Held*, that as the plaintiff v have been entitled to judgment for the taxes originally claimed, it have judgment in its favor for penalty, interest, and attorney's fees

ERROR to the Circuit Court of the United States for the of California.

The case is stated in the opinion of the court.

E. C. Marshall, Attorney-General of California, for in error.

S. W. Sanderson, *George F. Edmunds*, and *William M* for defendant in error.

HARLAN, J.—This action was brought in the Superior of San Bernardino, California, for the recovery of certain county and State, alleged to be due from the S Pacific R. Co for the fiscal year of 1880-1881. The claimed for county taxes is \$8785.90; that claimed for State is \$4608.99. For each sum judgment is asked, with five per cent per month from December 26, 1880, and costs of taxing.

The complaint alleges that the taxes were duly assessed upon "forty-eight $\frac{88}{100}$ miles of the roadway, road-b rails of said defendant, assessed at ten thousand eight hundred dollars per mile;" upon its rolling-stock, "assessed at ninety-three and thirty-three $\frac{15}{100}$ dollars per mile;" and upon its freight assessed at \$2000 per mile. It also alleges that the whole

defendant's property, so far as its franchise, roadway, rails, road-bed, and rolling-stock in California are concerned, was assessed for the period named at \$10,483,518, the length of the defendant's road in the State being seven hundred and eleven $\frac{5.6}{100}$ miles.

An answer was filed similar to those in the cases of *The County of Santa Clara, etc., v. Railroad Companies*, just decided (*ante*, 23). This case was removed to the Circuit Court of the United States upon the same grounds as those presented in the other cases.

The facts specially found by that court are, in all material respects, like those found in the former cases. The copy of the assessment roll for San Bernardino County introduced at the trial below is not, so far as it bears upon this case, materially different from that for Fresno and Santa Clara counties, set forth in the report of the other cases.

For the reasons given in the opinions delivered in the Circuit Court in the former cases, reported as *Santa Clara Railroad Tax Cases*, 9 Sawyer, 165, 210, judgment was given for the defendant.

But the bill of exceptions further states:

"That, after said judgment was ordered, the defendant, being enjoined to pay, notwithstanding the fact that the tax had been declared invalid, the full amount of said tax due, without penalty, interest, or counsel fees, and to leave the question of its liability for said penalty, interest, and counsel fees to be finally determined by the Supreme Court of the United States in cases already pending there, or in this case if appealed or taken there upon a writ of error, agreed, for the purposes aforesaid, that the judgment in its favor might be set aside and judgment in favor of the plaintiff be entered for the full amount of said tax, less penalties, interest, and counsel fees; which was done."

"And be it further remembered that, before said judgment for the defendant was set aside, and in open court, it was stipulated and agreed by and between the attorneys for the plaintiff and defendant, that if said judgment was set aside and judgment for the plaintiff entered as aforesaid, the said defendant should not be deemed to have admitted thereby the validity of the taxes claimed for any part thereof, nor should said judgment be treated, upon an appeal or proceedings under writ of error, as a consent judgment; defendant then and there expressly waiving that point, if point it was."

"And be it further remembered, that the object and purpose of the proceeding then had was to enable the defendant to pay into the State and county treasuries on account of the sum for which the judgment was rendered, without prejudice to the right of the plaintiff in the case to proceed for penalties, interest, and attor-

ney's fees claimed, and in order that the litigation might be brought to a speedy conclusion.

"The plaintiff tenders this its bill of exceptions, which, being agreed to by the respective attorneys for the parties, is allowed, signed, sealed, and made a part of the record of the court."

The record also shows that in forty suits, heard with this one, brought in the name of different counties, and of the State, against the Southern Pacific R. Co., the Central Pacific R. Co., and the Northern R. Co., to recover like taxes, alleged to be due to counties and to the State, judgments were ordered for the respective defendants; that thereafter a stipulation, signed by the attorney of the several defendants in those cases and by the attorney-general of the State, was filed, in which it is recited that the defendants, "notwithstanding the fact that the taxes therein sued for have been declared invalid, being minded to pay portions of the sums claimed," agree that judgments in favor of the plaintiffs might be entered for certain sums, being, as we suppose, the amount of the taxes sued for in the respective actions, less the penalties, interest, and counsel fees therein claimed.

On the 8th of December, 1885, the following stipulation was STIPULATION. filed in the court below, and a printed copy thereof filed in this case here:

"In the Circuit Court of the United States, Ninth Circuit, District of California.

"The County of San Bernardino, Plaintiff,	} No. 2757.
v.	
The Southern Pacific R. Co., Defendant.	

"It is hereby stipulated, between the parties to the above-entitled action, that for the fiscal year 1880-1881 the principal of the tax claimed to be due by plaintiff from defendant for State and county purposes amounted to \$13,394.88; that before judgment was entered herein in this court—from which judgment a writ of error has been taken—there had been paid on account of such taxes to the plaintiff herein, through its county officers, the sum of \$4932.40, leaving a balance due of \$8462.48, for which said sum judgment was taken.

"That for the fiscal year 1881-1882 the principal of the tax claimed to be due by plaintiff, the county of San Bernardino, from defendant for State and county purposes, was \$16,347.87; that before judgment was entered in the action brought to recover such taxes, the defendant therein, the Southern Pacific R. Co., paid to the plaintiff, through its county officers, on account of such taxes, the sum of \$6518.20, and judgment was taken in said action for the balance, \$9829.67.

"That for the fiscal year 1882 the total amount claimed by said county from defendant, the Southern Pacific R. Co., for State and

county purposes, was \$9681.45 ; that no payment had been made on account of said taxes, and judgment was, therefore, taken for the full amount.

"That in the three actions brought to recover taxes claimed to be due to the county of San Bernardino from the defendant herein, the total amount claimed as principal of State and county taxes, when the aforesaid judgments were entered, was \$27,928.60, which amount was, upon the rendition of said judgments, paid in full to the attorney-general, attorney for plaintiff, and by him subsequently paid into the county treasury of San Bernardino County, as directed by law, for the use and benefit of the State and of the county, and that said payment, together with the sums which had, prior thereto, been paid by said defendant, the Southern Pacific R. Co., on account of said taxes, constituted payment in full of the principal of all State and county taxes claimed to be due for the three years aforesaid.

"(Signed)

E. C. MARSHALL,
Att'y Genl. Cal. and Att'y for Plff.
P. D. WIGGINGTON,
Att'y for Defendant."

As it appears that the taxes for the recovery of which this suit was brought, have, through the action of the attorney-general of California, been received by the plaintiff for the use of and benefit of itself and the State, the only question which remains to be determined is as to the defendant's liability for the statutory penalty, interest, and attorney's fees. There is no substantial difference, upon the facts, between this case and that of the County of Santa Clara *v.* Railroad Companies, just determined; for, in this case, as in the others, the assessment—upon which the taxes sued for depend for their validity—improperly included fences, erected upon the line between the railroad and the lands of adjacent proprietors, at the rate of \$300 per mile. For the reasons given in the opinion in the other cases—which are equally applicable here—that assessment must be held to be insufficient as a basis for judgment against the company. As upon this ground judgment might have been rendered for the defendant, it is unnecessary to consider other questions determined by the court below, and discussed by counsel who appeared in this court.

ASSESSMENT INCLUDING FENCES INSUFFICIENT.

The plaintiff not, then, being entitled to judgment for the taxes originally in question, and the parties having stipulated that the judgment entered for the plaintiff, with the consent of the defendant, should not be treated as an admission by the latter of the validity of the taxes claimed, it follows that the plaintiff cannot have judgment in its favor for penalty, interest, and attorney's fees. Apart from every other view, the defendant could not be adjudged liable for penalty, interest, or attorney's fees for not paying taxes

arising out of an invalid assessment, and which, under the law, were not collectable by suit.

Judgment affirmed.

FIELD, J., concurring.—I agree to the judgment of the court in this as also in the other tax cases from California.

I regret that it has not been deemed wise by the court with its duty to decide the important constitutional questions involved, and particularly the question whether the property was so fully considered in the Circuit Court, and the question argued here, that in the assessment upon which the taxes were levied an unlawful and unjust discrimination was made between the property of the defendant and the property of the public, to its disadvantage, thus subjecting it to an unequal burden of the public burdens, and to that extent depriving it of the equal protection of the laws guaranteed by the Fourteenth Amendment of the Constitution. At the present day nearly all great industries are conducted by corporations. Hardly an industry can be carried on that is not in some way promoted by them, and a vast amount of the wealth of the country is in their hands. It is therefore, of the greatest interest to them that their property is subject to the same rules of taxation and

and taxation as like property of natural persons. Whether elements which affect the valuation of property should be omitted from consideration when it is owned by them, and included when it is owned by natural persons; and thus the value of property be made to vary, not according to its condition, but according to its ownership. The question is not whether the State may not claim for grants of privileges and franchises a fixed sum per year or a percentage of earnings of a corporation, but whether it may prescribe rules for the valuation of property for taxation which will vary according to whether held by individuals or by corporations. The question is of transcendent importance, and it will come here and continue until it is authoritatively decided in harmony with the requirements of the constitutional amendment which insures to every person, without distinction of position or association, the equal protection of the laws. This necessarily implies freedom from the imposition of unequal taxes upon persons under the same conditions. *Barbier v. Connolly*, 109 U. S. 27, 31.

Much as I regret that the question could not now be decided, I recognize fully the wisdom of the rule that the constitutionality of State legislation will not be questioned by the court unless by the case presented its question is imperatively required. Although the objection, that the assessment of the roadway there was included property not pertaining to it, was raised in the answer and taken on the merits,

CONSTITUTION-
ALITY OF ASSES-
SMENT.

CORPORATIONS—
RULES OF AS-
SSESSMENT AND
TAXATION.

CONSIDERA-
TION OF CON-
STITUTIONAL
QUESTIONS.

point was not discussed by counsel, as the constitutional questions were deemed of far greater importance. The attention of the court was specially directed to them, and thus the minor point was left undetermined.

After judgment had been entered in favor of the defendant on the ground that the assessment upon which the taxes claimed were levied was illegal, it entered into an agreement with the attorney-general of the State to allow the judgment to be set aside and a judgment to be entered in favor of the plaintiff for the face of the taxes claimed, and to leave the question of its liability for the penalty, interest, and counsel fees to be finally determined by the Supreme Court. It is stated in the record that the object and purpose of the proceeding was "to enable the defendant to pay into the State and county treasuries, on account, the sum for which the judgment was rendered, without prejudice to the right of the plaintiff in the case to proceed for penalties, interest, and attorney's fees claimed, and in order that the litigation might be brought to a speedy conclusion." It is also suggested that the same amount of taxes, if not recoverable when levied upon the property, might under the Constitution be recovered in another action when levied upon the mortgage; and in that event that the company could obtain a credit from the mortgagees for the payment. The motives of the company in this matter, however, do not affect the question of its liability for the penalty, interest, and attorney's fees. It was agreed between the respective attorneys that, in consenting to the judgment for the face of the taxes, the defendant should not thereby be deemed to admit their validity, desiring, as it would seem, to contest, on the ground of their alleged invalidity, the claim for the penalties, interest, and attorney's fees. Judgment was accordingly entered for the plaintiff for the face of the taxes claimed and the amount has been paid.

The arrangement was a wise and judicious one on the part of the attorney-general, as it at once enabled the State and county treasuries to have the amount of the taxes levied, and to proceed for the penalties, interest, and attorney's fees. To have refused such an advantageous arrangement might have subjected him to great animadversion. Every right which the State could under any circumstance have had was fully guarded by the agreement. No conceivable benefit could have arisen to the State by his refusing to accede to it, and, as it has turned out from the decisions in the other cases, great inconvenience and loss would have followed. The record shows that after the Circuit Court had announced its decision in favor of the defendant and different railway companies in forty other cases, brought to recover alleged delinquent taxes, they agreed to allow judgments to be entered against them for portions of the sums claimed. It was admitted by counsel on

the argument that these judgments, amounting to several thousand dollars, were for the face of the taxes; and claim in the cases for penalties, interest, and attorney by stipulation to abide the determination of the Supreme the present case.

According to the decision of the court in the Santa the assessment upon which the taxes were levied was i
 ILLEGALITY OF embraced items not assessable by the Board o
 ASSESSMENT. Of course no penalties for not paying an illeg
 no attorney's fees charged for the attempt to collect them
 recovered, and for a like reason the interest of two per cen
 claimed could not be demanded. Besides, the statute allo
 interest on delinquent taxes where property is possess
 delinquent upon which a levy could be made for them.
 lector must, on the third Monday of March of each yea
 affidavit that the taxes not marked paid on the delinquer
 not been paid, and that he has been unable to discover
 erty belonging to or in the possession of the persons li
 the same, from which to collect them. It is only on
 quent taxes that the two per cent a month interest is
 Since this case has been pending in this court a decis
 effect has been made by the Supreme Court of the State
 v. North Pacific Coast R. Co., 9 West Coast Rep. 574.

See County of San Mateo v. Southern Pac. R. Co., 8 Am. &
 Cas. 1; County of Santa Clara v. Southern Pac. R. Co., 13 Ib. 18

STATE BOARD OF ASSESSORS v. STATE. (CENTRAL R.
 et al., Prosecutors.)

(Advance Case, Court of Errors and Appeals of New Jersey. May

A law which taxes a class of property separately is not uncon
 it embraces all property of that class, and applies to it uniform
 taxes it according to its true value.

The property of railroad and canal companies constitutes a legi
 of property for the purposes of taxation,—a class which, in order
 it fairly in the matter of taxation must be treated separately.

Franchises are property, and, as such, are taxable.
 Depue, J., dissenting.

ON error from Supreme Court.

The Attorney-General and Messrs. Gummere and C
 plaintiff in error.

Messrs. DeForrest, Kaercher, Gowen, Williamson, Be
 son, McArthur, McCarter, and Drake for defendants in

RUNYON, Ch.—The judgments of the supreme court which are brought up for review by the proceedings in these cases set aside and annul, as being entirely void, the assessment and tax levied upon the respective defendants, under the act “for the taxation of railroad and canal property,” approved April 10, 1884. P. L. 1884, p. 142. The ground upon which those judgments are based is that the act is in contravention of the constitutional requirement adopted in the amendments of 1875, that “property shall be assessed for taxes, under general laws and by uniform rules, according to its true value.” The act, after providing that all the property of any railroad or canal company not used for railroad or canal purposes shall be assessed and taxed by the same assessors, and in the same manner, and at the same rate, as the taxable property of other owners in the same municipal division or taxing district, creates a State board of assessors to assess all the property of railroad and canal companies used for railroad or canal purposes, including their franchises; and directs that the board shall ascertain the true value of such property, and that in so doing they shall ascertain separately—first, the length and value of the main stem of each railroad, and of the water-way of each canal, and the length of such main stem and water-way in each taxing district; second, the value of the other real estate used for railroad or canal purposes in each taxing district, including the road-bed (other than main stem), water-ways, reservoirs, tracks, buildings, water-tanks, riparian rights, docks, wharves, and piers, and all other real estate except lands not used for railroad or canal purposes; third, the value of all the tangible personal property of each railroad and of each canal company; and fourth, the value of the franchise. It then declares that the term “main stem” is to be held to include the road-bed not exceeding 100 feet in width, with its rails and sleepers and the passenger depots; and that the term “water-way” is to be held to include the towing path and berme bank. It defines also the terms “taxing districts” and “tangible personal property” as used in the act. It provides that the State board of assessors shall be governed by the valuation of the local assessors, if lower than theirs, in ascertaining the value of the real estate used for railroad or canal purposes not included in the main stem or water-way, and that the local assessors shall certify to the board a description of the property of any railroad or canal company within their taxing district, both that which is not used for railroad or canal purposes, and that used for such purposes, excepting the main stem and water-way as defined by the act; also their valuation of those properties, and the local rate of taxation for county and municipal purposes. If, in any taxing district, there should be several branch lines of railroads belonging to or controlled by one company, or operated under one management, the assessors are to designate one of them as main stem, and the

PROVISIONS OF
ACT COMPLAINED
OF.

others are to be treated as "other real estate used for railroad purposes." The board are to compute the tax upon the entire assessed valuation of each railroad and canal company as ascertained by them, and the taxation is to be as follows: The company is to pay, upon the valuation, to the State, for State purposes, one half of 1 per cent annually, and, in addition thereto, the local rate for county and municipal purposes on the valuation of the real estate, other than main stem or water-way, that is used for railroad or canal purposes, in the taxing district; but such local rate is not to exceed 1 per cent of such last-mentioned valuation. The act provides that the sum of the estimates or computations for each company shall constitute the tax to be paid by it, and that if, upon complaint, the board shall find that the amount of the State tax and local rate, as limited in the act, combined, exceed the amount which the company would have to pay if assessed at and required to pay full local rates alone, then they shall reduce the whole tax to the amount which the company would be required to pay at the last-mentioned rate; and, in order to ascertain that amount (but for no other purpose), they may apportion the value of the franchise among the local taxing districts. Of the taxes assessed under the act the one half of 1 per cent is to be appropriated to State purposes, and the money received for tax upon property separately assessed in the different taxing districts is to be allotted to those districts, giving to each the amount derived from the property of each railroad or canal company therein. The foregoing are all of the provisions of the act which it is necessary or important to state for the consideration of the question which is now before the court.

In this connection it will be proper to refer briefly to the history of the legislation, other than such as is contained in special charters, by which taxes have been imposed upon railroad and canal companies in this State.

By the act of 1866 (Revision, p. 1150) it was provided that all real and personal estate within this State, whether owned by individuals or by corporations, except such as was owned by corporations which, by their charters, were expressly exempted from taxation, should be liable to taxation at the full and actual value thereof.

The railroad tax law of 1873 (Revision, p. 1166), after reciting that, for the encouragement of railroad enterprise, laws creating and regulating railways in this State usually provide for the payment by them, in consideration of their charter privileges, of a fixed rate upon their capital stock, or the cost of their works, in lieu of all other public impositions whatsoever; and that it was nevertheless intended that the property of such corporations, being largely acquired for or through the growth and extension of their prosperity, should contribute to the charges and expenses essential for municipal and county purposes; and that it was desirable, in order

to the avoidance of litigation and future dissatisfaction, that such municipal and county taxation should be authorized, and that it should be permanently fixed and regulated,—provided that railroad companies occupying and using railroads in this State, whether as lessees or otherwise, should pay, upon the cost, equipment, and appendages of their respective railroads, a State tax after such rate of taxation as might have theretofore been fixed by law upon such companies, or, in default thereof, after the rate of one half of 1 per centum upon such cost; and that they should pay upon all the real property by them occupied, used, or owned for the purposes of their roads or otherwise, excepting the main stem or road-bed and track, not exceeding 100 feet in width, and excepting also a tract of land not exceeding 10 acres at the *termini*, a county and municipal tax, for the benefit of the counties, townships, and cities, respectively, where such real property was situated, after the rate of 1 per centum upon a valuation thereof, and of all the improvements thereon not by way of repairs then or thereafter to be made. The act provided for the voluntary surrender, by any railroad company, of any privilege which it might claim of exemption from taxation under its charter, and for its acceptance in lieu thereof of the taxation provided by the act. The act was in force when the amendments to the constitution were adopted, among which was the before-mentioned provision that property shall be assessed for taxes under general laws and by uniform rules, according to its true value. It will have been seen that, under the act of 1873, the property was assessed for taxes for State purposes, not according to its true value, but according to its cost; and, as to taxes for county and municipal purposes, it was assessed upon a valuation. The cost for the assessment of the tax for State purposes was to be ascertained by a return thereof, on oath or affirmation, by the president of the company to the comptroller of the State; and the valuation for the assessment of tax for county and municipal purposes was to be fixed by a commissioner appointed by the governor. The act gave an action to the State against the corporation for false return in case the comptroller should be dissatisfied with the return of the president.

By the general railroad law (Revision, p. 925) passed in 1873, it was provided that the companies incorporated thereunder should pay to the State an annual tax of one half of 1 per cent upon the cost, equipment, and appendages of their road, including the cost of their road-bed, and such other taxes as might be assessed from time to time by a general law applicable to all railroads over which the legislature should have power for that purpose, at the time of passing such law, and that they should be regularly assessed and pay tax for the value of their real estate (except the road-bed, 100 feet wide), and the improvements thereon, and their personal property, as taxed at the time when that act was approved, in the city

or cities, township or townships, wherein it lay, at the same rate, and in the same manner, and for the same purpose by the same person or persons, as the other taxes assessed on cities or townships.

The act of 1876 (Revision, p. 1168) provided that all companies and corporations occupying or using railroad property in the State, whether as lessees or otherwise, liable to be taxed under a general law taxing railroads for State purposes, should pay an annual State tax upon the true value of such railroads, including equipments and appendages, at and after the rate of one per centum upon such value. The act contained a declaration, asserted, as it says, for greater certainty) that it should not increase or affect any county, municipal, or local taxation whatever. The act provided for a return of the valuation by the president of the company, and for the review of the valuation, or for the return of an original one if none should be returned, by a board of assessors and commissioners; and it gave to the company an appeal to the supreme court from the decision of the commissioners.

By the general law (Revision, p. 936) passed in 1877, it was provided that the companies formed under that act should pay to the State an annual tax of one half of 1 per cent upon the cost of the canals, including equipments, appendages, and expenses; that the cost of the canal in each case to be ascertained by the annual report of the president of the company under oath or affirmation.

Up to the time of the passage of the act of 1884, the railroad tax acts of 1873 and 1876 (the provisions of the latter expressly confined to the tax for State purposes) were regarded as valid, and were enforced. The question of their constitutionality, however, was never brought to a judicial test. It was in 1879 that, under the act of 1876, railroad corporations were required to pay a tax for State purposes upon the value of their roads and equipment and appendages (*State v. Railroad Co.*, 41 N. J. Law, 235); and that they were required to pay county and municipal taxes under the act of 1873 (*State v. Mutchler*, 41 N. J. Law, 96, and *State v. Wetherill*, Id. 147).

The act of 1884 covers both railroad and canal property, and fixes the same rate of taxation for State purposes which had previously existed for many years, but assesses it upon the valuation of the property of the company used for its purposes, including equipments, and provides for local taxation on part only of such property, as the general railroad tax law of 1873 did; and, while it fixed a rate of 1 per cent for local taxation, the act of 1884 provided that the rate for local taxation shall not exceed 1 per cent. It has been seen that the act of 1884 introduced no novelty in railroad taxation; but that, on the contrary, the same method substantially existing for taxing railroad companies had existed from 1873, under the act of that year, which act was modified in 1876 merely in order to conform it to the constitutional requirement.

The fact that railroad property, when the act of 1884 was passed, had been separately taxed, under similar legislation, both for State and local purposes, for so many years, and that the validity of such legislation on the ground of unconstitutionality had not been brought to any judicial test, although immense interests in the hands of vigilant guardians had been annually affected by it, is an important circumstance in the consideration of the question now before the court, because so practical and contemporaneous a construction of the constitutional provision, acquiesced in for so long a time, under such circumstances, and one so clear and uniform, must have weight with the court in settling judicially the construction of the provision, if the construction were otherwise doubtful.

The power of taxation is an essential, inherent attribute of sovereignty. In our State government it is vested in the legislative department. It is unlimited in extent, except as it may be restrained by constitutional provision or irrevocable legislative contract. Of course, to be exercised legitimately, it must be exercised within the scope of governmental authority as limited and circumscribed in our polity. To exercise it outside of the sphere of such authority would be usurpation. It is the province of the judiciary to determine whether, in any legislation submitted for its decision, the constitutional restraints or limitations have been disregarded or transcended. But, unless the legislation is found to be clearly in contravention of some constitutional provision, or to be outside of the limit of governmental authority, the court will not annul it. With the policy or impolicy, justice or injustice, of the legislation, irrespective of such constitutional considerations, the courts have nothing whatever to do.

The prosecutors complain and insist that in the act of 1884 the constitutional restraints and limitations have been ignored and exceeded; that the property of railroad and canal companies has been segregated, by arbitrary selection, for special and exclusive taxation, and made to bear, practically alone, the entire burden of taxation to raise money for State purposes, instead of its due proportion thereof only. And they insist that the legislation thus brought into question is in violation of the before-mentioned provision of the State constitution, that property shall be assessed for taxes under general laws and by uniform rules, according to its true value; and of the provision of the federal constitution that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws.

In the act under consideration, the legislature has separated for taxation, not all the property of railroad and canal companies, but only so much of it as is used for the particular purposes of those corporations, and has imposed upon the property so separated a tax for State purposes, and

POWER OF TAXATION.

ARGUMENT OF PROSECUTORS, ACT UNCONSTITUTIONAL.

PROVISIONS OF ACT. SEPARATION OF PROPERTY—ARBITRARY SELECTION.

tax for county and municipal purposes. The property of such companies not used for such special purposes is left to be taxed in the same manner as other like property. The property separated, so far as being taken by mere arbitrary selection, is all of it so circumstanced, by reason of the peculiar use to which it is put, as to make it on that account a class by itself. To value and tax such property in the same way in which other property is valued would be unjust. To do justice to the companies, and in common fairness, not only must the main stem of a railroad and the water-way of a canal be each valued and taxed as a unit, but the other property used in connection therewith, and for the same purposes, must also be valued and taxed with reference to such use. To make a just valuation thereof, property used for railroad or canal purposes must be estimated with regard to its value for such purposes. For example, the true value, for purposes of taxation, of railroad cuts and embankments and canal locks is not their cost, but what they are worth in connection with the works of which they form a part. This subject is well discussed and forcibly illustrated by Mr. Commissioner Hunt in delivering the unanimous opinion of the court in *People v. Barker*, 48 N. Y. 70. See, also, to the same effect, the opinion of the United States supreme court in *State Railroad Tax Cases*, 92 U. S. 575, 608 (1875); and in *Kentucky R. Tax Cases*, 115 U. S. 321; s. c., 6 Sup. Ct. Rep. 57 (1885).

This peculiarity of the property in question constitutes it a legitimate class for the purposes of taxation,—a class which, in order to deal with it fairly in the matter of taxation, must be treated separately. In the leading case of *Van Riper v. Parsons*, 40 N. J. Law, 123, it was held that a law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects which, having regard to the purposes of legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or local law, but a general law. See, also, s. c., 40 N. J. Law, 8. Railroad and canal property has such characteristics, and the act under consideration extends to and operates equally upon all such property. The law, therefore, is a general law. In *State Railroad Tax Cases*, *ubi supra*, it was said that railroads by themselves constitute a class for the purposes of taxation.

The constitutional provision requires that not only the assessment shall be under general laws, but that it shall be by uniform rules also. It does not require that all property shall be assessed for taxes, but that property, when assessed for taxes, or, in other words, such property as shall be assessed for taxes, shall be assessed under general laws, etc. Certain property has been exempt from taxation ever since the amendments to the constitution were adopted, and such exemption has received the judicial sanction. The property is of the same kind as that which

PROPERTY
QUESTION
LEGITIMATE
CLASS.

CONSTITUTIONAL
PROVISION.

is taxed, but the use to which it is devoted,—the purposes of religion, education, benevolence, etc.,—makes it a class, and justifies the exemption.

The constitutional provision does not take away from the legislature the power of selecting the subjects of taxation (*State v. Runyon*, 41 N. J. Law, 98; *State v. Collins*, 43 N. J. Law, 562; but it does require that all the members of the class selected shall be included in the taxing law, and that the rule applied thereto shall be uniform as to the whole of the class, and that the assessment shall be made at the true value of the property constituting the class; and, if these requirements are answered by the law, it is not in conflict with the constitutional provision.

POWER OF LEGISLATURE TO SELECT SUBJECT OF TAXATION.

If the legislature has power to exempt, on account of the special use to which they are put, certain kinds of property from the taxation to which other property of the same kind, but put to general uses, is subjected, it has the right to provide, in its discretion, that such special property shall be assessed at a different rate and in a different way from the other. Judge Cooley, in his work on Constitutional Limitations, says (page 497) that constitutional requirements that taxation upon property shall be according to value do not include every species of taxation; but that all special cases such as those which he specifies, among which are those where corporations are required to pay a certain sum annually in proportion to their capital stock, or by some other standard, which methods are regarded by the State as most convenient and suitable for the taxation of such organizations, are, by implication, excepted. In fact, under our laws, various methods, which have received express judicial sanction, are employed for the taxation of the property of various kinds of corporations in order that such property may be taxed at, and not beyond, its true value.

Railroad and canal property being peculiar property, which cannot, in justice to its owner, be valued in the same way as other property of a like nature, the legislature was bound to provide a proper method of valuing it justly for the purposes of taxation. Such method must be a peculiar one. The machinery provided for the purpose by the act—a State board of assessors—is appropriate, and such as is necessary in view of the peculiar character of the property. If, by the method adopted, the companies are required to bear no more than their just share of the public burden of taxation, they surely have no ground of complaint. Whether the tax which they pay is appropriated to State purposes alone, or to State and county municipal purposes, is a matter which does not concern them. All taxes, whether levied for State, county, or municipal purposes, are State taxes; they can be imposed by no other authority than that of the

DUTY OF LEGISLATURE TO PROVIDE PROPER METHOD OF VALUING RAILROAD PROPERTY.

State. The State appropriates the proceeds to what it sees fit; but, however the proceeds may be appropriated, it is a State tax. *Camden & A. R. v. Commissioners of A. R.* N. J. Law, 71; *State v. Cook*, 32 N. J. Law, 338; *State City*, 43 N. J. Law, 135. If the legislative provision for taxation of the property of railroad and canal companies is a contravention of the constitution, it will stand. The amount of the proceeds of the taxation cannot affect the validity of the tax.

The power of apportionment is not limited or affected by the constitution, and the judiciary has no control over it. The legislature, in the act of 1884, to secure the railroad and canal companies against being required to pay more than their full share of tax. The act provides that the State board of assessors, upon complaint of any company, in any case ascertain that the addition of the State tax of 1 per cent to the local rate, as limited by the act, would require any company to pay more tax than such company would have paid if it did not pay that State tax, but did pay full local rates on its property used for railroad or canal purposes, and its tangible personal property and franchises, without any other exemptions such as would be allowed to an individual citizen on such property, then, and in such case, the board shall make such deduction from the local rate, so that the tax on the property shall make the tax equal to the amount that the company would have paid upon all that property, including the franchises, if assessed at the local rates, without any State tax; and that, for the purpose of ascertaining the amount (but for no other purpose), the board shall apportion the value of the franchise among the taxing districts.

Nor can it be successfully contended that under the act a company may be required to pay a greater proportion of tax for State purposes than another; for, as before stated, the apportionment does not affect the constitutionality of the tax, and each company is to be assessed upon the same kind of property, at precisely the same rate, and by exactly the same method of valuation. The assessment of tax for State purposes is to be upon the entire valuation of each railroad and each canal company, as assessed by the State board of assessors. And here it may be observed that if the legislature may tax the property separately, and by a peculiar rule the peculiar character of which is made necessary for justice to the owners of the property, as well as to those owners of other taxable property, in view and by reason of the use to which the property is applied, the fact that only part of the property is taken into account in one of the methods (*i. e.*, in making the amount to be paid in respect of county and municipal purposes) is no moment. The tax applied to State purposes and that applied to county and municipal purposes are one tax, and are so regarded.

The act provides that the sum of the estimates or computations for each company shall constitute the tax to be paid by each company. It may be added that no system of taxation can be devised which will be free from criticism, on the ground that, in some way or other, it works unequally, or lacks complete uniformity. Said the court, in *State Railroad Tax Cases*:

UNEQUALITY OF
TAXATION.

"Perfect equality and uniformity of perfect taxation, as regards individuals or corporations, for the different classes of property subject to taxation, is a dream unrealized. It may be admitted that the system which most nearly attains this is the best. But the most complete system which can be devised must, when we consider the immense variety of subjects which it necessarily embraces, be imperfect."

The objection is made that under the act only the property mentioned in subdivision 2 of section 3 (real estate used for railroad or canal purposes, not including main stem or water-way) is subjected to assessment for taxation for county and municipal purposes, whereby it is argued the companies escape their share of county and municipal taxation in respect of the main stems or the water-ways, and the tangible personal property in the taxing districts. But if the taxes be but one tax, and the legislature has the right to fix the amount of that tax by the means adopted, it follows that the objection is without actual foundation; for the legislature has a right to say what tax the companies, in view of the peculiar character of their property, shall pay, and in what way it shall be assessed, provided it makes the assessment under general laws and by uniform rules, according to the true value of the property. To hold otherwise would be to hold that the legislature is bound to tax all property at the same rate and in the same way, without regard to the use to which it is put. To summarize the views above presented: The power of taxation is in the legislative branch of the government alone. It is unbounded except as it may be limited by constitutional restraint. A law which taxes a class of property separately is not unconstitutional if it embraces all property of that class, and applies to it uniform rules, and taxes it according to its true value. The constitutionality of such a law is to be determined in the same way in which it would be determined if the property taxed were the only property taxed in the State.

It is manifest, from the provision that the companies shall not be required to pay more tax for all purposes under the act than they would be required to pay at full local rates, that the act is not liable to the criticism that it selects the property of two classes of corporations from the mass of similar property, not to put upon it a proportionate part of a general tax, but to charge it with the whole amount of a separate tax; for, so far from putting upon the property a separate tax,

SEPARATE TAX
FOR STATE PURPOSES.

the legislature has carefully provided that it shall not pay any more than it would pay if taxed at precisely the same local rates as other property, without any taxation for State purposes. Moreover, it may be remarked, railroad and canal companies are not the only corporations which are required to pay taxes for State purposes. Another act of 1884, entitled "An act to provide for the imposition of State taxes upon certain corporations, and for the collection thereof," requires other corporations to pay license tax to the State upon their franchises. And here it will not be out of place to speak as to the taxability of franchises. They are undoubtedly property, and, as such, are taxable. *Burroughs, Tax'n*, § 85; *Society for Savings v. Coite*, 6 Wall. 594; *State Railroad Tax Cases*, 92 U. S. 575. The act provides that the State board of assessors shall ascertain the value of the franchises separately. They are to ascertain their true value. They have a value which can be estimated. *State Railroad Tax Cases, ubi supra*.

CONTRAVENTION
OF FOURTEENTH
AMENDMENT TO
CONSTITUTION.

There is no substance in the objection that the law in question contravenes the provisions of the fourteenth amendment to the federal constitution, that no State shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws. The act provides that a hearing be given to the companies interested, touching the valuation and assessment of the property, and for a review of the assessment by the board, upon complaint of any company or person aggrieved, or of the attorney-general, or of any member of the board, in behalf of the State, that the property is assessed too low, or that the property has been omitted, and for the correction thereof by the board as shall seem just; and that, if such complaint be by the attorney-general, or a member of the board, there must be notice to the company or person to be affected by the proceedings. The act also provides that any company or person assessed, or the attorney-general in behalf of the State, may contest by *certiorari* the validity or amount of any tax levied under the act, and that, upon the writ, relief may be had as well in cases where it is claimed that the amount of tax is excessive or insufficient as in cases where it is claimed that the principle upon which the assessment is made is erroneous. This present proceeding is an illustration of the extent to which, and the thoroughness with which, such matters may be litigated.

Without entering upon the question raised upon the hearing whether artificial persons are within the scope of the fourteenth amendment to the federal constitution, it is enough to say that in the supreme court of the United States it has been held that laws similar to that under consideration are not in violation of the provisions of that amendment. In *Davidson v. New Orleans*, 96 U. S. 97 (1877), it was held that whenever, by the laws of a State,

or by State authority, a tax assessment, servitude, or other burden is imposed upon property for the public use, whether it be for the whole State or some more limited portion of the community, and those laws provide for a mode of confirming or contesting the charge thus imposed, in the ordinary courts of justice, with such notice to the person, or such proceeding in regard to the property, as is appropriate in the nature of the case, the judgment in such proceedings cannot be said to deprive the owner of his property without due process of law.

And the same doctrine was affirmed in the Kentucky R. Tax Cases, 115 U. S. 321. In that case it was insisted that the law of Kentucky made an unjust and unconstitutional discrimination against railroad companies and their prop-

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erty, because such property, though called real estate in the legislation, was classed by itself as being distinct from other real estate, such as farms and city lots, and subjected to different means and methods for ascertaining its value for purposes of taxation, which methods differed also from those which were applied to the property of corporations chartered for other purposes, such as bridge, mining, street railway, manufacturing, gas, and water companies. And it was urged that such discrimination and difference were in violation of the rights of the railroad company under that clause of the fourteenth amendment which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. The court said, on this point, that there was nothing in the constitution of Kentucky which required that taxes should be levied by uniform method upon all descriptions of property; but the whole matter is left to the discretion of the legislative power, and that there is nothing to forbid the classification of property for purposes of taxation, and the valuation of different classes by different methods; that the rule of equality in respect to the subject only requires that the same means and methods be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances, and that there is therefore no objection to the discrimination made as between railroad companies and other corporations in the methods and instrumentalities by which the value of their property is ascertained, and that the different nature and uses of their property justify the discrimination in that respect which the legislature has seen fit to make.

It may be remarked that in what are known as the San Mateo Case (8 Am. & Eng. R. R. Cas. 1 and 13 Fed. Rep. 722) and the Santa Clara Case (9 Sawy. 165 and 18 Fed. Rep. 385), in the United States circuit court for the district of California, the adjudication in reference to the fourteenth amendment was upon a provision of the constitution of California denying to railroads

and other *quasi*-public corporations the same right of exemption from the taxable value of their property of the mortgage debt thereon which was allowed to other corporations. Discrimination was held to be a denial of the equal protection of the laws. Those cases deal with a constitutional discrimination and have no bearing upon the cases in hand to which the decisions of the United States supreme court above are pertinent.

It remains to consider the objection that the act is unconstitutional as to those railroad companies whose charters contain the provision that the company shall pay a tax of one half of 1 per centum upon the cost of the road, "provided that no other tax or impost shall be levied or assessed upon said company." By the act "concerning the taxation of railroads" it is provided that the charter of every company shall hereafter (that part of the act was passed in 1846) be subject by or created under any of the acts of the legislature to alteration, suspension, and repeal in the discretion of the legislature. Every charter granted since the passage of the act is subject to it. A similar provision is contained in all the railroad charters. It has been held in this court that an irrepealable contract can result from the provisions of a charter which is made in terms subject to alteration, amendment, or repeal by the power granting it. *State v. Miller*, 31 N. J. Law, 100. *v. Jersey City*, Id. 575. The provision in the charters was merely a declaration that the legislature, at the time of granting the charter, intended that the companies should not be chargeable with any other tax than the one half of 1 per centum (Little v. Bowers, 46 N. J. Law, 300); and, those charters being subject to alteration, the provision as to tax contained therein presents no obstacle to the application of the act of 1884 to the property of the companies. By the reservation of the power to alter the legislature retained the power to tax.

On the hearing of these cases this court declared that it would not hear argument at that time upon the subject of the constitutionality of the act as to those companies claiming to have irrepealable contracts prior to the operation of the act. But four of the cases were before the court, the Morris Canal & Banking Co., the Morris & Essex R. Co., the Paterson & Hudson River R. Co., and the Paterson R. Co.—claim to have such contracts. The judgment of the supreme court in all the cases except those in which the companies are prosecutors should be reversed, and the records of the cases should be retained for the purpose of being referred to the supreme court, to be proceeded upon according to the decision in those cases the records should be retained for argument. The question reserved as to whether those companies have irrepealable contracts.

DEPUE, J. (dissenting).—The writs of *certiorari* in these cases brought to the supreme court for review the valuation and assessment of the property of the several prosecutors, consisting of real estate used for railroad purposes, tangible personal property, and franchises, made by the State board of assessors, and the taxes assessed thereon by the said board for the year 1884, pursuant to the provisions of an act of the legislature approved April 10, 1884, entitled "An act for the taxation of railroad and canal property." P. L. 1884, p. 142. Some of the prosecutors have irrepealable charters. The court directed the argument, as to the effect of the act of 1884 upon charters having an irrepealable quality, to stand over until the next term. The charters of the greater part of the prosecutors are such as contain a provision for the payment to the State annually of a certain sum,—as, for instance, a per centum on cost or capital stock,—with proviso that no other tax or impost should be laid or levied upon them, and a clause reserving to the legislature the power of altering or repealing the charter. These corporations have no contract with the State on the subject of taxation. The only semblance of a contract there is under such a charter is on the part of the company to pay the sum named in its charter as a condition on which its corporate franchise was granted. The proviso that other taxes shall not be imposed is a mere legislative concession, revocable at the will of the legislature, and rescinded whenever the legislature, in the exercise of its power of taxation, subjects such corporations to other or additional taxation. *State v. Commissioner*, etc., 37 N. J. Law, 228; s. c., 38 N. J. Law, 472; *State v. City of Elizabeth*, 37 N. J. Law, 432. These corporations, in virtue of the reserved power of alteration or repeal, are liable to taxation the same as private persons, and are equally entitled to dispute the validity of the law by which taxes are imposed as not being a constitutional exercise of the power of taxation.

The tax laid by the act of 1884 is a tax upon property. The act is entitled "An act for the taxation of railroad and canal property," and the provisions in it, which designate the subjects of taxation, the mode of assessment, and valuation thereof, and the computation of the taxes thereon, indicate taxation on property as the purpose of the act. The tax to be assessed and levied has none of the qualities of a tax *in personam*,—none of the characteristics of indirect taxation for franchise. The franchises of the corporations comprised in this act are made taxable on the true value thereof as property, and as part of the property of such corporations. The counsel on both sides discussed the case on the assumption that taxation by the act of 1884 was taxation upon property, and in that view I concur. The inquiry which arises, therefore, is whether the taxation provided for by the act of 1884 is in compliance with the provision introduced

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QUESTION.

by the amendments of 1875, that "property shall be taxed under general laws and by uniform rules, according to true value." Const. art. 4, § 17, p. 12.

The theory of our government is that the sovereign power of taxation is unlimited, except as qualified or restrained by constitutional limitations; that this power of taxation consists in the power to select and classify the persons or property to be made the subjects of taxation, and when the classes or kind of property set apart for taxation have been selected, then to apportion the tax among those of the class which bear the burden, upon the principle of uniformity; that, if the burden is common, there shall be a common contribution to charge it. *State v. Parker*, 32 N. J. Law, 426; *State v. Committee of Readington*, 36 N. J. Law, 66. The principle under consideration is how far the constitutional prescription that property shall be assessed for taxes under general laws and uniform rules, according to its true value," has restrained the power of the legislature in the selection and classification of property for the purposes of taxation.

In the distribution of the powers of government the power of taxation is lodged in the legislative branch. For an unconstitutional, oppressive, or unnecessary exercise of this power by the legislature there is no redress except by the people. So long as constitutional limitations are not exceeded, or the constitutional rights of the citizen are not invaded, the legislature is the supreme authority, which the courts and others, must obey. *Cooley, Tax'n* (2d Ed.), pp. 43-44. In the same plan of government which lodges the power of taxation in the legislative department of the government has conferred upon the judiciary the power, and has imposed upon that branch of government the duty, to determine whether the legislative method of taxation adopted by it, has exceeded constitutional limitations, or invaded the constitutional rights of citizens. If a constitutional amendment will be made in favor of the legislative act that is complained of, and any construction that is within rational bounds will be resorted to in the endeavor to harmonize the legislative act with constitutional limitations. But if, on an investigation made in this spirit, it be found that the legislative act is in violation of constitutional limitations, or an infringement upon the constitutional rights of those who are made the subjects of taxation, the duty of the judiciary in the premises can neither be avoided.

The constitutional provision invoked relates only to the power of taxation upon property. It leaves unimpaired that branch of the legislative power which consists of the imposition of indirect taxes, the exercise of franchises, or the pursuit of business, trades and professions. Over this subject the discretion of the legislature

strained, save only by the need of conforming to that essential quality of taxation that, when a class of persons or things is selected for taxation, the tax must be imposed upon individuals of the class under a rule of uniformity.

Nor does this constitutional provision require the taxation of all property which is legitimately the subject of taxation. On that construction, the argument of Mr. Collins, who appeared in this suit for the several municipalities, and contended in their behalf that, by force of this constitutional provision, the property of these companies became subject to taxation in the several taxing districts of the State in common with other property in those districts, would be irresistible. The second section of the general tax act of 1866 (Revision, 1150), and the enacting clause of the act of 1878 (P. L. 1878, p. 61), in designating the property to be taxed, were comprehensive enough to embrace the real and personal property of all railroads and canals. The taxation of such property was taken out of the provisions of these acts by section 5 of the act of 1866, and the proviso in the act of 1878. The constitutional provision being self-executing, and, *propria vigore*, abrogating all special legislation on the subject (*State v. Newark*, 39 N. J. Law, 380; s. c., 40 N. J. Law, 558), and making void all such legislation in the future, it is difficult to see how, in the light of the decisions of our courts, the exemption, in the fifth section of the act of 1866, of corporations having repealable charters, from taxation on real and personal property, or that contained in the proviso in the act of 1878, could stand consistently with a constitutional requirement of such import.

If special charters may be repealed by a general law, as was held by this court, and the supreme court, in *State v. Commissioner of Taxation*, 37 N. J. Law, 228; s. c., 38 N. J. Law, 472, much more clearly would the same result be effected by a self-executing constitutional provision, which, as the supreme law of the land, must operate to efface from the statute book every legislative act repugnant to its provisions. But I do not assent to this interpretation of the constitutional provision. The power of taxation is not derived from a constitutional grant. Immediately upon the organization of the colony as a free and independent government, and the establishment of a legislative department of the government, the legislature was, *ipso facto*, invested with the power of taxation by a fundamental principle of government, derived from the mother-country, that taxation is a legislative act, and is necessarily inherent in the legislative branch of the government. Neither of our State constitutions, nor the amendments of 1875, contains any grant of the power to tax. The only provision on that subject is the amendment under discussion, and that is a restriction on the power of taxation which the legis-

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NOT REQUIRED
TO BE TAXED.

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PROVISION.

lature possessed from the organization of the government it is a fundamental doctrine, in the interpretation of constitutional limitations derogatory to the powers of a co-ordinate branch of government, that construction should not be pushed beyond the plain and reasonable interpretation of the letter of limitation.

The framers of the constitutional amendments, in the reasonableness of exempting churches, charitable institutions and institutions of learning from taxation, and the wisdom of justice, in some instances, of indirect taxation, as by taxes on franchises, trades, or occupations, with the general tax act of 1873 (which did exempt religious, charitable, and educational institutions and corporations from taxation upon property), and the franchise tax act of 1873 (which laid a tax upon franchises) being so construed seemed to have avoided that expression in the constitutional provision which would have readily occurred to them if there had been a constitutional provision which would require all property to be taxed. The provision adopted and recommended to the people, and approved by the legislature and the people, does not support that construction. It interdicted taxation on property under general laws and by uniform rules, and according to uniform values, but left unimpaired the power of the legislature to make classifications, to designate the property which should be taxed under a property tax. The Supreme Court so held in *Stratton v. Collins*, 43 N. J. Law, 357, and in *Stratton v. Collins*, 43 N. J. Law, 357, and in *Stratton v. Collins*, 43 N. J. Law, 357, 562; and in that construction of the constitutional provision we concur. But with the selection of the property to be taxed, the power of the legislature to discriminate ends. The rule of uniformity prescribed for taxation prevents property from being classified and taxed as classed by different rules. To that effect see *Pine Grove v. Talcott*, 19 Wall. 666, 675; *Gilman v. C. & F. Co.*, 2 Black, 510, 518.

In the next place, the constitutional provision does not require the machinery by which taxes shall be assessed or collected. The system of taxation consists of two parts: the one relating to the assessment (the designation of the persons or property which shall be the subjects of taxation, and the apportionment of taxation among such persons or property according to the ratio prescribed by law); the other, the collection of the taxes, or the enforced payment thereof. The constitutional provision in question relates only to the assessment of taxes, and the equalization of the burden of the taxes. It respects only such equalization of the burden of the taxes as would result from the designation of the property which shall be subjects of taxation, and the apportionment of the taxes among such property under general laws and by uniform rules, according to uniform value. The mere machinery by which taxes shall be assessed and collected is left in legislative discretion. *Trustees of the Schools v. City of Trenton*, 30 N. J. Eq. 668. A rule of construction

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a canal is a peculiar kind of property, and the appraisement and valuation of such property, including the rolling-stock—property used in transportation—and franchises, as a unit, by a State board of assessors, instead of an appraisal of it by local assessors in detached parts, would be indispensable in estimating such property at true value, which is the basis of taxation under the constitutional provision. A law providing for such an appraisement and valuation of all railroads and canals, and the apportionment of the valuation thereof among the proper taxing districts to be taxed by local assessors in common with other taxable property, or providing for the entire process of laying the taxes; and the collection thereof, by State officers, by a sale, in its entirety, of the property assessed, would be a general law, in compliance with the constitutional requirement that property should be assessed for taxes under general laws. But the constitutional provision does not stop with the requirement that property should be assessed for taxes under general laws. It adds the further prescription that the assessment should be by uniform rules and at true values. The object of this constitutional provision was twofold: the equalization of the burden of taxation in the apportionment of taxes for State purposes among the several counties, and of taxes for State and county purposes among the minor taxation districts, in which all taxes are in fact levied and collected; and also the equalization of the burden upon all those who are subject to taxation in the political division for the use of which taxes are laid,—in the State, if for State purposes; in the county, if for county purposes; and in the minor political divisions (townships, cities, or wards), if for municipal or local purposes.

By uniform rules is meant uniformity in the standard of valuation and rate of taxation. How that uniformity shall be attained will depend upon the purpose for which the particular tax is laid. If it be for State purposes, it must be at the UNIFORMITY IN RATE OF TAXATION. rates of taxation uniformly applied in the State in taxation for State purposes; if for county or municipal purposes, at the same rate at which property is taxed for such purposes. *State v. Runyon*, 41 N. J. Law, 99. As was said by Mr. Justice Dixon, the constitutional provision requires and is satisfied by such regulations as would impose the same percentage of its actual value upon all taxable property in the township for township purposes, in the county for county purposes, and in the State for State purposes. *Stratton v. Collins*, 43 N. J. Law, 563.

That part of the act of 1884 which provides for taxation on the property of railroad and canal companies not used for railroad or canal purposes is not in dispute. The controversy relates solely to the taxation of property used for those purposes. The WHAT STATE BOARD SHOULD ASCERTAIN IN ASSESSMENT. act provides, in section 3, that property of that description shall be assessed by a State board of assessors, and at true

value, and that the board should, in such ascertainment, ascertain separately (1) the length and value of the main stem of each railroad and of the water-way of each canal, and the length of such main stem and water-way in each taxing district; (2) the value of the other real estate used for railroad or canal purposes in each taxing district in this State, including the road-bed (other than main stem), water-ways, reservoirs, tracks, buildings, water-tanks, water-works, riparian rights, docks, wharves, and piers, and all other real estate, except lands not used for railroad or canal purposes; (3) the value of all the tangible personal property of each railroad and of each canal company; (4) the value of the franchise. Upon the entire assessed valuations of the property in these subdivisions an annual State tax is laid at the rate of one half of 1 per cent. Besides the State tax an additional tax is laid upon the property named in subdivision 2, for the benefit of the several taxing districts⁸, at the local rates at which other property is assessed in such taxing districts for county and municipal purposes; but it is provided that in no case should the last-mentioned rate exceed 1 per cent; and it is further provided that in case the State tax, of one half of 1 per cent, and the local tax as limited in the act, would compel any company to pay more tax than the tax such company would pay if it did not pay the State tax, but did pay full local rates on all the property and franchises mentioned in section 3, without any other exemptions than would be allowed to an individual citizen on such property, such deductions should then be made as would make the tax equal to the amount such company would pay on all the property and franchises mentioned in section 3, if assessed at full local rates without any State tax.

The rate fixed by the act for local taxation upon that part of the companies' property used for railroad and canal purposes made liable to such taxation is manifestly a departure from the constitutional rule. In taxing districts where the rate of taxation for county and municipal purposes exceeds 1 per cent the limitation of the tax on these companies to 1 per cent produces a discrimination in assessing taxes, prejudicial to other tax-payers in such districts, and is in violation of the constitutional rule of uniformity.

It is said that, the discrimination being in favor of the prosecutors, they cannot avail themselves of that fact to annul the tax assessed against them. If the legislative power to lay the tax was not in controversy, and the objection was simply for inequalities in the execution of the law, the objection would not be heeded. But that presentation of the case does not correctly represent the position in which the matter is placed before the court. Taxes have been assessed against the prosecutors, the collection of which is about to be enforced. They dispute the validity of the law under which the taxes were laid; and, if they present legal grounds for sustaining their contention, the

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court cannot refuse relief on any notion of the propriety or reasonableness of the conduct of parties. The prosecutors say that, under their charters, and the laws antecedent to the act of 1884, they were exempt from local taxation on this part of their property, and they insist that that exemption has not been taken away by the act of 1884, because of the non-conformity of that law to constitutional requirements. It is the prerogative of every citizen and taxpayer to say to the government, "Tax me according to law, or not at all;" and it would be no response to the assertion of that prerogative to reply, "If you had been taxed according to law, you would have fared worse." To avoid recurring to this subject again, I may say here, in response to the argument so freely used that these companies are still a favored class in the matter of taxation, that that fact would be a substantial objection to this law on constitutional grounds; for, as it seems to me, it would be impossible to sustain the law as being constitutional as applied to these prosecutors, and pronounce it to be unconstitutional when other persons, upon whose property taxes have been assessed, make resistance on the ground that the taxes assessed upon their property have not been laid upon all property liable to be assessed for taxes by a uniform rule.

In *State v. Yard*, 42 N. J. Law, 357, and in *Stratton v. Collins*, the constitutional question was raised by persons whose property had been assessed, on the ground that other property not assessed should have been brought in and subjected to taxation in common with their property and at an equal rate.

The tax levied on the prosecutors for State purposes is a State tax, and is laid exclusively on the property of the prosecutors. The rate of tax fixed by the act is one half of 1 per cent, subject to a certain adjustment which I will refer to presently. I have already said that uniformity in the rate of taxation is determined by the territory or political division for the use of which the tax is laid; that the constitution requires the same percentage of actual value upon all taxable property in the township if for township purposes, in the county if for county purposes, and in the State if for State purposes. That is the principle enunciated in *Stratton v. Collins*, and sustained in an unvarying line of judicial decisions. The method of laying State taxes in this State is by an equal percentage upon all the taxable valuations in the State, and the apportionment of the amount to be raised among the several counties in the ratio of taxable valuations in each, for assessment and collection as other taxes are assessed and collected.

At the time the act of 1884 was passed, the act of 1881, laying a State tax for the support of schools, was in force. The tax laid by that act was laid, as I have mentioned, by an apportionment among the several counties in proportion to the amount of taxable real and personal property

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in each, to be assessed and collected in the manner in which other taxes were assessed, levied, and collected. Acts 1881, p. 120. By these two acts—the act of 1881 and the act of 1884—we have this situation of affairs: Two State taxes, the one levied exclusively on the taxable valuations of the property of railroad and canal companies, the other exclusively upon the other taxable valuations in the State. These two systems of taxation cannot stand together, or be brought in harmony with uniformity in the rules of taxation. That they will inevitably produce inequality of rates in taxation is apparent. That in fact they bring about that result is demonstrated by a few figures taken from the report of the State comptroller for 1885. The total valuation of real and personal property in the State (other than railroad and canal property), on which the State school tax was laid, was \$554,828,114.34. The State tax raised thereon was \$1,424,244, and the rate of taxation to raise that sum was a small fraction over two and a half mills on each dollar. The valuation of the real and personal property of railroad and canal companies, as assessed under the act of 1884, was \$140,236,605.43. The tax for State purposes on that property was \$701,182.05, and the rate of taxation was five mills on each dollar. The gross amount of taxable valuations of real and personal property in the State, including the real and personal property of railroad and canal companies, was \$695,064,719.76. The State school tax and the tax on the real and personal property of these companies aggregated \$2,125,426.05, and, laid on the gross valuation of property in the State, would require a tax a small fraction over three mills (3.06 mills) on each dollar.

But it is said that the rate of taxation named in the act of 1884 was so adjusted by the twelfth section as to secure equality in the rates of taxation, both for State and local purposes.

PLAN OF ADJUSTING RATE OF TAXATION.

The plan adopted by that section is that, in cases where the State tax and the local tax exceed the tax the companies would pay if taxed at local rates upon all their property used for railroad and canal purposes, such deduction should be made as would make the tax amount equal to the amount such company would pay on all its property and franchises if assessed at full local rates without the State tax. This plan of adjustment is plainly inefficient to secure equality and uniformity in the rate of State taxes. Local rates are determined by that percentage on taxable valuations in the locality which is necessary for all the local purposes for which such tax is required to be laid,—the expenses of local government, the supply of water, the expenses of police and fire departments, the cost of erecting school-houses, the cost of public improvements above assessments for benefits, the interest or principal of municipal indebtedness, and the like,—and vary with the extravagances or misfortunes in conducting local governments. The State school tax for 1884 was raised, by a rate of two and a

half mills, one quarter of 1 per cent. The local tax for the same year in Newark was 2.03 per cent; in Orange, 2.62; and in Jersey City, 2.98. A uniform rate of taxation for State purposes can be obtained only on a ratio of the tax to be raised to the taxable valuations in the State.

But I need not pursue this matter further. As I understand the views of the majority of the court, it is not claimed that the act of 1884 provides for taxation either for State or local purposes on a rule uniform with that on which taxes, RULE OF UNIFORMITY—HOW COMPLIED WITH. State or local, are laid under the general tax act of 1866. The position taken is this: that the constitutional provision allows a classification of property for taxation under general laws, and that, upon such a classification, the rule of uniformity prescribed by the constitution is complied with if the tax be laid upon property within the classification of an equal percentage, without regard to the rate of taxation upon other taxable property in the State; that local taxes may be laid on property in the classification at one rate, and upon other property at a different rate, and State taxes be levied with the same diversity in rates, provided only that a uniform rate be observed in the tax upon property within each class; and that property used for railroad and canal purposes may be segregated into a class, and subjected to taxation at any rate that may be prescribed by the legislature.

The power of discrimination asserted in this proposition may well challenge the closest scrutiny. The classification made CLASSIFICATION. POWER OF DISCRIMINATION. by the act of 1884 is either upon the use which is made of property, or upon the ownership of it. On the principle adopted, lands used for agricultural purposes, city lots, lands improved or unimproved, timber, mining, or mineral lands, mills, and lands used for manufacturing purposes, and the implements used in agriculture, or in the various branches of mechanical pursuits, may be set apart in classes, and taxed at any variety of discordant rates, provided uniformity of rate be observed within each particular class. Indeed, the capacity which lies within the doctrine of classification is aptly illustrated in this case. A classification which sets apart indispensable parts of the structure of a railroad—as cuts, embankments, switches, turn-outs, engine-houses, and freight depots—from the main stem, if beyond the 100 feet prescribed as the width of the main stem, and puts those parts into a class to be taxed separately for local uses, is regarded as a legitimate classification.

The authority pressed upon the court's attention with the most confidence as justifying this construction of our constitutional provision is the decision of the supreme court of the United States in the State Railroad Tax Cases, STATE RAILROAD TAX CASES COMPARED. reported in 92 U. S. 575. The tax in that case had been laid under a statute of Illinois which provided that the whole taxable property

of railroad companies should be ascertained by the State board of equalization, and that the State, county, and city taxes should be collected within each municipality on this assessment in the proportion the length of the road in such municipality bears to the whole length of the road within the State. The rule for the apportionment and the assessment adopted was uniform in its action on all railroad companies, but was not uniform with the methods by which other property was taxed under the general tax laws. The question before the court was whether this mode of taxing railroad companies was consistent with section 1 of article 9 of the constitution of Illinois, which is in these words:

"Section 1. The general assembly shall provide such revenue as may be needful, by levying a tax by valuation, so that every person and corporation shall pay a tax in proportion to the value of his, her, or its property; such value to be ascertained by some person or persons to be elected or appointed in such manner as the general assembly shall direct, and not otherwise; but the general assembly shall have power to tax peddlers, auctioneers, brokers, hawkers, merchants, commission merchants, showmen, jugglers, innkeepers, grocery keepers, liquor dealers, toll-bridges, ferries, insurance, telegraph, and express interests or business, vendors of patents, and persons or corporations owning or using franchises and privileges, in such manner as it shall from time to time direct by general law, uniform as to the class upon which it operates."

The court sustained the tax upon the peculiar features of the State constitution which expressly excepted certain classes of persons and things, among which were persons or corporations owning or using franchises and privileges, out of the general equality clause, and adopted a special equality clause for taxing such persons or things by providing that they should be taxed in such a manner as the legislature should from time to time direct by general law, uniform as to the class upon which it operated. Mr. Justice Miller, in delivering the opinion of the court, placed the decision distinctly on that discrimination in the constitutional provision, "because," as he says, "the latter part of the section in express terms authorizes the legislature to tax persons and corporations owning or using franchises in such manner as it shall from time to time direct, by general law;" and the only restriction on the power, as applied to this class, is that it shall be "uniform as to the class upon which it operates." He then adds:

"There can be no doubt that all the classes named in this clause . . . are taken out of the general rule of uniformity prescribed by the first clause, and the only limitation as to them is that of uniformity as to the class upon which the law shall operate."

In this respect the constitution of Illinois and the constitution of this State are totally dissimilar. Our constitution makes no discrimination in the property which the legislature has subjected to

taxation, with respect to the rules by which it shall be taxed. The rules must be uniform, whatever method may be adopted in making the assessment, and in the machinery by which the tax is assessed, laid, or collected. The case cited is no precedent for the construction of our constitutional provision.

Another precedent, cited with a great deal of confidence, is the case known as the Kentucky Railroad Tax Cases, reported in 115 U. S. 321 and 6 Sup. Ct. Rep. 57. The complaint in that case was of a statute which discriminated against KENTUCKY RAILROAD TAX CASES COMPARED. railroad companies, in the fact that railroad property, though called real estate, was classified by itself, distinct from other real estate, and different means were provided for ascertaining its value for the purposes of taxation; and the protection of the fourteenth amendment of the constitution of the United States was appealed to for relief. The court denied relief, on the ground that no constitutional provision of the State of Kentucky had been violated. Mr. Justice Matthews, who read the opinion of the court, puts the decision on the ground (to quote his own language) that "there is nothing in the constitution of Kentucky that requires taxes to be levied by a uniform method upon all descriptions of property. The whole matter is left to the discretion of the legislative power, and there is nothing to forbid the classification of property for the purposes of taxation, and the valuations of different methods. The rule of equality in respect to the subject only requires the same means and methods to be applied impartially to all the constituents of each class, so that the law shall operate equally and uniformly upon all persons in similar circumstances." This case is simply an elucidation of the general doctrine that, where the power of the legislature is not restrained by express constitutional limitations, the designation of property to be taxed and the manner of taxation are matters within the discretion of the legislature. It is a precedent irrelevant to the construction of express constitutional limitations upon the legislative power of taxation.

Union Pac. R. Co. v. Cheyenne, 113 U. S. 517, is a case of the same import. The court held that a statute for assess- AUTHORITIES REVIEWED. ing and taxing the property of railroad and telegraph companies as a whole, and distributing it ratably among the different counties and the several taxing districts in proportion to the number of miles in each, was valid. The tax was laid in the Territory of Wyoming, and there was not there any express constitutional restraint upon the power of taxation.

Another class of cases cited from federal and State courts is also inapplicable to this subject. I refer to the decisions on the legislative power of indirect taxation by taxes on privileges, franchises, trades, and occupations, and excise duties, of which *Society for Savings v. Coite*, 6 Wall. 594; *Head-money Cases*, 112 U. S. 580-594; s. c., 5 Sup. Ct. Rep. 247; *Com. v. Cary Imp. Co.*, 98

Mass. 19; *Youngblood v. Sexton*, 32 Mich. 406; *New Orleans v. Kaufman*, 29 La. Ann. 283; *Kittatinny Coal Co. v. Com.*, 79 Pa. St. 109,—are types. This branch of the legislative power of taxation is universally admitted not to come within the equality clauses in constitutional provisions relative to taxation upon property; and, in constitutions which simply provide that all taxations shall be equal, a distinction is made between taxes on property and taxes on franchises, occupations, and pursuits, for the reason that in property there is always present the element of market value as the basis on which equality in taxation can be attained by the application of a uniform rate on such values; but in franchises, trades, or occupations there is no element of value in common, and hence the rule of equality is not violated by taxation on these subjects by a rule which is uniform as to each class. The cases on this subject are cited by Mr. Justice Cooley in discussing the constitutional provisions of the several States. Cooley, *Tax'n* (2d Ed.), 176-200, 379.

It may be remarked that in *State v. Railroad Com'rs*, 41 N. J. Law, 235, and *State v. Mutchler*, Id. 96, no constitutional question was raised or considered. The first case was submitted on briefs, which appear in the printed report of the case, and neither in the reasons filed, nor in the argument of counsel, was any constitutional question presented. Nor was any question of that character raised by counsel or considered by the court in the other case; and in that case the company was exempt from taxation such as that from which it was relieved, by its charter, and by the general tax act of 1856, irrespective of the act of 1873. *State v. Township Committee of Readington*, 36 N. J. Law. 66, was decided before the constitutional amendments were adopted or framed.

With the exception of the decisions upon the peculiar language of the constitution of Illinois, the precedents in the State and federal courts on express constitutional limitations upon the powers of taxation designed to secure equality in taxation are uniformly against any discrimination in taxation upon property. In Ohio the constitutional provision is that "laws shall be framed, taxing by a uniform rule all moneys, credits, investments," etc., "and all real and personal property according to its true value in money."

The supreme court of Ohio, in a case so often quoted, in construing the language "taxing by a uniform rule," said:

"Taxing by a uniform rule requires uniformity, not only in the rate of taxation, but also uniformity in the mode of assessment upon the taxable valuation. . . . But this is not all. The uniformity must be coextensive with the territory to which it applies. If a State tax, it must be uniform all over the State; if a county, town, or city tax, it must be uniform throughout the extent of the territory to which it is applicable. But the uniformity in the rule required by the constitution does not stop here. It must be ex-

tended to all property subject to taxation, so that all property must be taxed alike,—equally,—which is taxing by uniform rules.” *Exchange Bank v. Hines*, 3 Ohio St. 1-15.

The constitutional provision in Wisconsin is “that the rule of taxation shall be uniform, and taxes shall be levied upon such property as the legislature shall direct.” The charter of the city of Janesville provided for an annual tax upon all the property in the city subject to taxation, not exceeding 1 per cent for current expenses, and such additional taxes for roads, bridges, and the support of the poor as the common council might deem necessary. Within the corporate limits of the city, but outside of the recorded plat of the original village of Janesville, was a large quantity of farming or agricultural lands. By a subsequent act the legislature provided that land used, occupied, or reserved for agricultural or horticultural purposes should not be taxed for city purposes beyond one half of 1 per cent; nor for roads, bridges, and support of poor more than one half as much per dollar as should be levied for such purposes on property within the recorded village plat. This latter act was held to be unconstitutional, as being in violation of the constitutional rule of uniformity. *Knowlton v. Supervisors Rock Co.*, 9 Wis. 410. In a later case in the same court a city charter provided for taxation upon real and personal property, and in one section gave the common council power to lay and collect a tax on all the lots and land in the city, not including any improvements thereon, to pay the city’s bonded debt. This section was held to be in violation of the constitutional rule of uniformity. Mr. Justice Lyon, in the opinion of the court, said:

“The true doctrine unquestionably is that, while the legislature may by law exempt certain specific property or classes of property from taxation, such exemption, to be valid and operative, must be absolute and total. The legislature has no power to exempt property from one tax, or from taxation for one purpose, and hold it liable to taxation for other purposes; and this for the reason already indicated, that it is impossible to do so without violating the rule of uniformity which the constitution requires the legislature to observe. *Hale v. City of Kenosha*, 29 Wis. 599-604.

The supreme court of the United States, dealing with a statute of the same State, empowering a city to lay a tax for a particular purpose on real estate exclusively,—real and personal estate being taxed for other purposes,—held it to be unconstitutional; and Mr. Justice Swayne, in the opinion of the court, said that “it was beyond the constitutional power of the legislature to make any discrimination. Property must be wholly exempted, or not exempted at all. No partial exemption or discrimination is permitted. To impose certain taxes exclusively upon one class of taxable property is as much a discrimination as to vary the rates of the same or

other taxes upon different classes of property." *Gil of Sheboygan*, 2 Black, 519.

In a later case the same learned judge, speaking of tional provision of the State of Michigan that the legis provide a uniform rule of taxation except as to prop specific taxes, said:

"The object of this provision was to prevent unjust tions. It prevents property from being classed and classed by different rules. All kinds of property mu uniformly, or be entirely exempt." *Township of Pi Talcott*, 19 Wall. 666-675.

The decision of the court in *Cummings v. National U. S.* 154, though directed against systems of valuat to operate unequally, has a direct application to law so framed as to produce that inequality.

These decisions establish the principle by which co provisions designed for the protection of p
PRINCIPLE FOR
CONSTRUCTION
OF CONSTITUTION-
AL PROVISIONS. unequal taxation must be construed. The this case is to take constitutional limitation rule upon the words "under general laws." The wor laws" were brought into prominence by the peculiar p paragraph 2 of section 7 of article 4 of the amended which provides that the legislature shall not pass priv special laws in certain enumerated cases,—as, for insta ing the internal affairs of towns and counties,—but s therefor by general laws. The place this expression paragraph is totally unlike that which it occupies in th on the subject of taxation. In paragraph 2 the only r the legislative power is that it shall legislate by genera when a classification by a general law is once made, th the legislature to legislate over that class is unlimited graph 12, relating to taxation, an additional restrictio The mandate is that property shall be assessed for general laws and by uniform rules, at its true value. tion which gives a controlling effect to the words "g practically excise the other member of the sentence pendent of the constitutional prescription, it was an es ity of taxation that, when a class of persons or things for taxation, the burden must be distributed among th of the class on the rule of uniformity.

In the construction of constitutions, as well as of sta cardinal principle that words are to be taken in their ordinary sense; and that every word shall have a part, in declaring the intention of the maker. The words "eral laws," in this paragraph, can have full scope an without detracting from the effect of the other wor have already said that, for the purpose of assessment au

and even the completion of the whole process of taxation, upon railroad and canal property, the act of 1884 is for that purpose a general law. It accomplishes the purpose contemplated by the constitution by securing the true value of property, which otherwise would be valued inadequately. It fulfils the purpose of the constitution in requiring the assessment of taxes under general laws, in order that special modes of assessment and valuation, which might produce inequalities in taxation, should not be resorted to. But the words "under general laws" cannot be permitted to control the whole sentence, of which they are only part, without overriding a fundamental rule of construction.

A construction which conforms to proper rules, at the same time will secure the object such constitutional restrictions are presumed to have been adopted to promote,—equality in taxation,—which can be secured only by the application of uniform rates of taxation to property at the true values. The language of this constitutional provision, giving words their natural meaning and the sentence a grammatical construction, can be made to signify nothing else. If the language had been that property shall be assessed for taxes under general laws, by uniform rules, according to its true value, it would be possible, by a refinement of construction, to impute this meaning: that all that was required was that property should be classified for taxation, and then taxed by rules uniform as between members of the same class. But the paragraph, as inserted in the constitution, is given a complex form by the conjunction of the two members of the sentence in the use of the word "and," which lexicographers define to signify "that a word or part of a sentence is to be added to what precedes." Webst. Dict. "And." Property is to be taxed "under general laws" and "by uniform rules, according to its true value." Both the constituent parts of the sentence, "general laws" and "uniform rules," are made essential to a valid act of taxation. A simple reading of the sentence carries with it at once that meaning. Contrasting the language of this paragraph with the proviso in the constitution of Illinois, or even with the language used in opinions read this morning to express a different construction, will indicate the difference in language and expression necessary to effect that purpose. A constitutional provision expressed in that language, placed alongside of this constitutional provision, would appear to be another and a different instrument.

Under an organic law for taxing property at its true value, there can be no classification except as a means of ascertaining true values. Different kinds of property have different grades of value; but true value is a characteristic of all kinds of property, and peculiar to no one species so as to make it a class by itself. The classification adopted in this act is upon the use to which the property is devoted; but the use to

CLASSIFICATION
AS MEANS OF
ASCERTAINING
VALUE.

which property is applied does not alter its true value. An engine is of the same market value in the shop of a manufacturer as when placed upon a railroad track. A locomotive moving a train of cars on the track of a railroad has no characteristic distinguishing it from an engine moving the machinery in a factory, except that one is movable and the other is stationary. Passenger cars on a steam railroad track have no characteristic distinguishing them from passenger cars on a horse railroad track, except that the former are more costly and of greater value. Horses drawing boats for a canal company have no characteristics distinguishing them from horses drawing drays upon the streets of a city. Boats used in transportation upon canals have no peculiarities distinguishing them from boats of the same build used in the carrying business upon the Passaic and the Hudson. The docks along the Hudson from which ocean steamers and vessels employed in freighting or carrying passengers to domestic ports sail have no characteristics distinguishing them from the adjacent slips from which the ferry-boats of railroad companies run. The miles of wharves along the Passaic used for shipping and discharge of freight by private owners or navigation companies are not characterized by any peculiarities distinguishing them from the wharves owned by the canal company, which would put them in one group for one rate of taxation and the canal company wharves into another group for taxation at another rate.

But it is said that the property of these companies possesses peculiar qualities distinguishing it from the property of private individuals or other corporations, in the fact that it is associated with and is necessary for the exercise of corporate franchises, or of the business of operating railroads or canals, and therefore may be disassociated from other property intrinsically of the same nature, for a different sort of taxation, or for taxation at a different rate. Such a mode of taxation is not taxation on property at its true value. It is that method of taxation which can lawfully be resorted to only in the exercise of the power of indirect taxation, by taxation upon franchises, trades, or occupations, and this act has none of the features of such a mode of taxation. It is what its title imports, taxation of property. As such, I think the mode in which it is exercised is not in conformity with the constitutional provision.

Mindful of the great importance of this case, and of the public interest in the question involved, I have given the subject a careful and thoughtful consideration. If my investigation had left my mind in doubt, I would defer to the opinions of my associates. But investigation has produced in my mind a conviction that the law is in violation of constitutional restrictions, so strong that I cannot yield my judgment to the opinions of others. The taxation imposed is said to be an equitable and fair method of taxing

DISTINCTION AS
NECESSARY FOR
EXERCISE
OF
CORPORATE
FRANCHISE.

these companies. It probably is, and the law has been executed by the board of assessors with a commendable regard to fairness. But it is not the equity or fairness of the system, but the legislative power to tax by this method, that is brought before the court for decision.

A faulty construction of a statute does a wrong, but the injury is temporary. The statute may be altered or repealed. The construction of constitutional law is not for a day or an occasion, and the introduction of an erroneous principle of construction is an abiding wrong that will work incalculable mischief. Every citizen holds his rights and his property under the protection of the constitution, and is interested that, at all times and upon every occasion, sound rules of constitutional construction shall be laid down and adhered to. In the construction of the constitutional provision every citizen having property has a direct interest. It is a part of the organic law, adapted to be a barrier against injustice by unequal taxation. The construction proposed to be put upon it, in effect, eradicates it from the constitution, and puts the power of taxation where it was before the amendment was adopted, and even enlarges the power of selection and classification beyond the limits imposed by settled principles of taxation. The right to classify, and to subject property to taxation in classes at such rates and for such purposes as the legislature may will, affects property of every description and ownership in the State. By this act it is applied to the property of the prosecutors; but who may foretell to what purposes or to what property this doctrine of classification may be extended in the future?

IMPORTANCE OF
CONSTRUCTION
OF CONSTITU-
TIONAL LAW.

For these reasons, I shall vote to affirm the decision below.

DIXON, J. (partially concurring, partially dissenting).—Under “An act for the taxation of railroad and canal property,” approved April 10, 1884, taxes were levied in that year upon all property used for railroad or canal purposes under a franchise in this State. The Central R. Co. of New Jersey and 33 other railroad and canal companies sued out writs of *certiorari* to review the assessments thus made, and thereupon the supreme court held the act to be unconstitutional, and for that reason set aside the taxes. Writs of error were then brought on behalf of the State, and the records are now before us. Although it is within the province of this court, on writ of error, not only to reverse or affirm the judgment brought up, but also, in case of reversal, to render such judgment as should have been entered below, if the necessary facts have been settled, yet upon the argument the court confined the present inquiry to the question, in substance, whether the judgments of the supreme court should stand.

FACTS.

The defendants in error insist that the statute is invalid, because

it violates fundamental principles which must be observed in every exercise of the taxing power, because it does not conform to paragraph 12, § 7, art. 4, of the State constitution, and because it infringes the fourteenth amendment of the constitution of the United States.

The general principles of taxation need but slight notice. It is GENERAL PRINCIPLES OF TAXATION. laid down that the power to tax belongs to the legislature and its agents exclusively; and that the courts, in the absence of constitutional restriction, have no control over its exercise beyond seeing that the will of the legislature is enforced. By this is meant, not that the power of taxation is a limitless power, but only that the legislative authority over the subject—taxation—is absolute. Taxation is a thing capable of definition, the boundaries of which, in our system of government, are to be ascertained from the history of the English and American people; but over the area thus determined the will of the legislature is the supreme law. No doubt, impolitic or unjust taxes may be levied, but the only remedy for such impositions is by appeal to the legislature. The courts may decide whether any particular exaction is a tax or not; but, if found to be a tax such as they whose institutions we inherit recognized as coming within the range of the taxing power, it is the duty of the judiciary to uphold the levy, regardless of their own views of its wisdom or equity. The struggle for fairness of taxation must remain in the parliamentary arena, except as it may be removed to some other sphere by constitutional provision.

With regard to the present law, nothing has been urged against it on the general principles of taxation which may not, with equal force, be urged against it on the words of our constitution, except the assertion that the legislature cannot authorize a levy to be made without first determining how much is needed for governmental purposes, and confining the levy to that sum. I know of nothing in the history of taxation which gives countenance to this claim, and therefore pass on to consider the constitutional restrictions.

The State constitution declares that "property shall be assessed DECLARATIONS OF STATE CONSTITUTION. for taxes under general laws and by uniform rules, according to its true value." It is clear that the case in hand is subject to this provision; that it is one wherein property is assessed for taxes. This is manifest both from the title of the statute, "An act for the taxation of railroad and canal property," and from the body of the law, by which the ownership or possession of property is made the sole ground for and measure of assessment. It is necessary, therefore, to ascertain the meaning of this constitutional clause.

The sentence does not import that all the property within the

jurisdiction of the taxing body must be assessed. Such an aim has never been deemed attainable by theorists; such an object has never been sought after by the legislature of this State; such an interpretation has never, by any branch of the government, been put upon the provision, and its language does not fairly support such a meaning. This clause was ingrafted upon our organic law by amendment adopted September 7, 1875, when it was still, as it long has been and yet is, an open question among political economists how taxes should be distributed over property so that their burdens may be borne by those best fitted to sustain them; and it is reasonable to suppose that, if there had been entertained a design to settle this question by constitutional edict, the design would have been plainly declared. But such an intention cannot be made apparent on the face of this amendment without adding to it a word the importance of which the framers could not have overlooked. "Property" and "all property" are not interchangeable terms, and we are not warranted in substituting one for the other. The whole purpose of the sentence appears to be to define the mode in which property shall be dealt with when it is assessed for taxes. It requires three things in such assessments: first, that they shall be made under general laws; secondly, that they shall be made by uniform rules; thirdly, that they shall be made according to the true value of the property assessed. The signification of these three clauses will afford us the proper tests of the validity of the statute under review.

First. What are general laws? Since the expression "general laws" became prominent in our theories of constitutional construction, it has been on all hands agreed that a law operating equally throughout the State, and embracing all of a group of objects which naturally form a class by themselves, or which are fairly classified by the legislature for legislation touching the basis of classification, is a general law. This principle was enunciated by the chief justice in *Van Riper v. Parsons*, 40 N. J. Law, 1, and is now firmly imbedded in our jurisprudence. For present purposes, the phrase "general laws" needs no further definition.

Secondly. What are uniform rules for the assessment of property? In *Stratton v. Collins*, 43 N. J. Law, 562, it was said that this clause requires that the same imposition should be made upon all the taxable property in the township for township purposes, in the county for county purposes, and in the State for State purposes. This statement, although sufficiently exact for the case then before the court, is broader than the constitution seems, on reflection, to demand. The expression "uniform rules" is not of wider import than the expression "general laws;" and if the latter may be confined to a

CONSTRUCTION
OF TITLE TO ACT.

GENERAL LAWS.

DEFINITION OF
UNIFORM RULES
FOR ASSESS-
MENT.

class, with equal propriety may the former. Indeed, strictly speaking, a prescript may be a uniform rule, without prevailing over even a class; for it would be a rule if designed for the government of a single individual; and if designed for the government of more than one, could be called a uniform rule. But such an interpretation would be too narrow for this constitutional phrase. Its collocation with the words "general laws" indicates that it was to have a corresponding meaning, and the whole sentence becomes harmonious by holding that it requires the same regulations to be applied to every member of each class which the general laws recognize or establish. This signification of the word "uniform" is common. Thus the laws of nature are uniform, although none of them is universal, and many operate in single classes only. The same idea is well illustrated in the practice of the United States government. The federal constitution provides that all duties, imposts, and excises shall be uniform throughout the United State; yet these taxes have always been levied in divers methods and amounts upon the different classes of property and business. So it empowers Congress "to establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies, throughout the United States." But various rules of naturalization have been prescribed and maintained without question, for distinct classes of aliens, as widows, minors, soldiers, seamen, and those residing here before specified dates; and the laws for the bankruptcy of bankers and traders have differed from those concerning other persons. This diversity in uniformity can rest only on the right to classify. The same import is expressly affixed to the word in the constitutions of Pennsylvania and Illinois, which enjoins uniformity in each class only; but it is held to be implied with equal force in the constitution of Wisconsin, under the provision that "the rule of taxation shall be uniform." *Wisconsin Cent. R. Co. v. Taylor Co.*, 52 Wis. 37; s. c., 8 N. W. Rep. 833. Similar views of the meaning of the term are expressed in *Youngblood v. Sexton*, 32 Mich. 406.

The third clause of the provision, that property shall be assessed for taxes according to its true value, excludes an assessment according to cost, number, weight, measure, fineness, or any other standard except true value,—that is, the value which it has in exchange for money,—and requires that the tax exacted from each person owning or possessing property of the class assessed shall bear the same proportion to the whole amount of taxes exacted from all persons having property of that class as the true value of each one's classified property bears to the true value of all the property.

With these explanations of the constitutional provision, we come to examine the statute in question.

ASSESSMENT
ACCORDING
TO TRUE VALUE.

This enactment is susceptible of two interpretations: one, as being designed to authorize a single annual tax, levied upon all property in the State used for railroad or canal purposes under a franchise; the other, as being designed to authorize such a tax for the direct use of the State, and also an annual tax for each taxing district to be levied upon so much of the real estate, used for railroad or canal purposes in each district, as is described in subdivision 2 of section 3 of the statute. A perusal of section 12 shows that while the whole sum chargeable in each year against any company is made a unit for the purpose of collection, constituting a single lien,—a single debt,—recoverable by a single action, yet up to the point of ascertaining what each company shall pay for the use of the State and what for the use of each taxing district in which its property lies, the processes of assessment are distinct, or at least quite distinguishable. The court is therefore at liberty to adopt whichever view of the act will most accord with the constitution and effectuate the legislative purpose to tax.

Let us consider, first, the law as one to impose a tax for the State, and a separate tax for each district. With regard to the State tax, the law provides for a board of assessors, and directs these officers to ascertain the true value of all property used for railroad and canal purposes, of each railroad and of each canal company in this State, including its franchises, and embracing in the term "company" not only corporations, but also individuals and associations owning or operating railroads or canals under a franchise; and it imposes an annual tax of one half of 1 per centum of such value upon each company. These are the essential features of the assessment. The act contains, besides, some instructions as to the mode of ascertaining true value, and of claiming and allowing deductions for debts, etc.; but these are only subsidiary to the main design; and, if in themselves misleading or unconstitutional, can be rectified or disregarded under that provision of the act which requires the supreme court to correct assessments appearing to have been made upon erroneous principles or for improper amounts. If, therefore, these essential features of the law are consistent with the constitution, the law is valid, and this tax can be maintained, either as it was levied by the assessors, or as it may be modified by the supreme court. Is the law, then, with reference to these features, constitutional? The property to be assessed is all property used for railroad purposes and all property used for canal purposes. This is, in my judgment, legitimate classification. It is true that things used for railroad and canal purposes are not in essence different from such things when put to other uses. But this classification of property need not rest upon the essence of things. The use made of them forms as just and as common a basis of classification as does their essence. So prominent in the very conception of property is the

use of things that it would be singular if property, as such, had not been often classed upon that basis. Accordingly, we find in our crimes acts, execution acts, tax acts, and other statutes, that the use for which property is held is constantly made the ground for legislation concerning it. It would be a waste of time to particularize the instances. As long as railroad and canal corporations have existed in this State, the property employed by them under their franchises has been placed apart from other property for both the method and the amount of taxation. The same custom has prevailed elsewhere, and has received the approval of the highest judicial authority. Said the court in the *Kentucky Railroad Tax Cases*, 115 U. S. 321: "The right to classify railroad property as a separate class, for purposes of taxation, grows out of the inherent nature of the property and the discretion vested by the constitution of the State in the legislature." Inasmuch, therefore, as the law is to prevail everywhere in the State, and also relates to entire classes of property, it meets the requirement that laws for the assessment of property shall be general.

The law also directs that the assessments upon these classes of property shall be made by uniform rules, according to the true value of the property. Its simple mandate is that each company shall pay an annual tax equal to one half of 1 per centum of the true value of its property used for railroad or canal purposes, including its franchises. Some objections have been interposed to the inclusion of railroad franchises, to the effect that they are not property, and that they have no exchange value, since similar franchises may be acquired by any persons organizing under the general railroad law. It suffices to say that this act imposes no tax upon franchises, but merely requires that they shall be considered in ascertaining the value of the property assessed. The franchises intended are but the legal privileges which the company enjoys in the use of its property, and, of course, therefore, should not be disregarded in determining what that property is worth to its present possessor, and would be worth to any other possessor having the same privileges; and their importance is by no means destroyed because any other person who can obtain the same kind of property may use it in the same manner. The imposition of the tax of one half of 1 per cent is in compliance with the constitution.

Let us now turn to the local tax. Concerning this, the law directs (section 3) that the board of assessors shall ascertain separately (1) the length and value of the main stem of each railroad, and of the water-way of each canal; the term "main stem" to include the road-bed, not exceeding 100 feet in width, with its rails and sleepers and depot buildings used for passengers connected therewith; the term "water-way" to include the towing-path and the berme-bank; (2) the value of the

TAX UPON RAIL-
ROAD FRANCHISE

DUTY OF ASSESS-
ORS AS TO
LOCAL TAX.

other real estate used for railroad or canal purposes in each taxing district in this State; (3) the value of all the tangible personal property of each railroad and of each canal company; (4) the value of the franchise. It further provides (section 6) that, whenever in any taxing district there shall be several branch lines of railroad belonging to or controlled by one company, the assessors shall designate one of said lines as the main stem, and the value of the others shall be included in the separate valuation provided for in subdivision 2 of section 3. It then enacts (section 12) that each company shall pay, in addition to said tax of one half of 1 per cent, a tax at the local rate, as fixed and assessed for county and municipal purposes upon other property in each taxing district, upon the valuation of its property in the several taxing districts, separately valued and assessed under the provisions of subdivision 2 in section 3 of the act, which tax shall also be computed by the State board of assessors; but the last-mentioned rate shall in no case exceed 1 per cent of the valuation of the property valued under the provisions of subdivision 2 of section 3. This tax, when collected by the State, is to be transmitted to the several taxing districts for their local uses.

The first question here again arising is whether the law for the imposition of this tax is general; whether it embraces GENERALITY OF THE LAW. entire classes of property. In making the assessment, the property to be valued, and upon the valuation of which the tax is to be computed, is that described in subdivision 2, exclusive of the property mentioned in the other subdivisions. Is such property capable of being regarded as a class or classes of property? There must be conceded to the legislature a large discretion on the subject of classification, and the judiciary has no right to thwart its reasonable exercise. But, with this in mind, I have not been able to find any fair basis on which the property, thus submitted to special taxation for local uses, can stand as a class by itself. How does the main stem of a railroad, to the width of 100 feet, differ, as a class of property, from the main stem lying beyond that width? On what principle are passenger depots ranked with the main stem, and freight depots, water-tanks, and all the other necessary adjuncts of a railroad excluded? What stamps the locks and berme-banks of a canal with one character, and its planes and feeders with another? Or how can the mere designation of one branch line of railroad as a main stem cause it to differ from other branch lines controlled by the same company in the same district? How will you describe or conceive of, as classes of property, groups so segregated? The divisions thus constituted by the legislature seem to me to be defined by no substantial distinctions, but to be purely arbitrary or fanciful, and a law which deals with them exclusively is special and not general.

That feature of the statute which limits the tax for local uses to

1 per cent when the local tax on other property ex-
LIMITATION OF LOCAL TAX. cent has also been assailed. But, in my judgment, a limitation is permissible, provided the property is not favored forms a class by itself. As before stated, the court is satisfied if, in each taxing district, the same rules of valuation are applied to all members of the same class. It is not, however, that this local tax can, under the act, be assessed at the true value of the property on account of which it is levied. The intention expressed in the statute is that the property described in subdivision 2 shall be valued separately from the property mentioned in the other subdivisions. For the purposes of the local tax, this direction is only a means to an end; the end is the valuation of the whole railroad and canal property; and, in obedience to the act itself must, if necessary, employ the designated means for the sake of the more important end. For the purposes of local taxes, the valuation of this separate property is the end itself,—the very basis on which the tax is computed,—and it cannot be disregarded without overthrowing the tax. Now, the question arises, whether the true value of the property can be ascertained by any process of estimation which leaves out of view the main stem of the railroad, the whole of the canal, and the franchises under which alone the property can be utilized. This question appears to be a serious one, and unnecessary to pursue the matter, because, for the reasons stated, the law, so far as it provides for the local tax, is not general, and therefore unconstitutional. If the statute directed the assessors to ascertain the true value of all the property used for railroad or canal purposes in each taxing district, and had authorized taxes to be levied thereon by uniform rates for local uses according to that value, the difficulties here stated would have been avoided. The property designated would not have composed a class, and its true value could have been determined by reference to the value of the system to which it pertained.

Recurring, then, to the view of the statute thus far considered, it appears that the law, so far as it directs a tax of one per cent for State uses, is valid, and so far as it directs a tax for local uses is invalid. There are no insuperable obstacles in the way of upholding the one tax without the other, and the perplexities pointed out in argument as attending upon the enforcement of the law will disappear if the local tax is sustained.

But it was said that the act might be interpreted as designed to authorize a single tax to be levied upon all property in the State used for railroad purposes, which tax, when collected by the State, might be retained in part for State uses, and in part be distributed to the local taxing districts for local uses. If the law can be so interpreted for the accomplishment of this design, it is our duty to

ANOTHER INTER-
 PRETATION OF
 THE ACT.

Under this interpretation the legislative scheme would be that the assessors should ascertain the true value of all property used for railroad or canal purposes; that they should also ascertain the true value of the property included in subdivision 2 of section 3; that they should then determine how much money would enable the State to retain for itself one half of 1 per cent of the value of all the property, and to pay over to each taxing district an ascertainable percentage of the value of such part of that property situated in the district as is described in subdivision 2. So far the steps of the law would not transgress the constitution. Considering the property to be assessed as the whole property used for railroad or canal purposes, the valuation of the designated portions of this property might be regarded as made only in order to aid in ascertaining the gross sum to be raised, and in distributing it when collected; and if the law had then directed or permitted the assessment of this gross sum upon the property assessed by uniform rules, according to the true value of the property, it might have been upheld. But it does not permit such an assessment. It requires the tax to be apportioned among the several companies, not according to the value of each company's property as classified and assessed, but only in part according to that value, and in part according to the value of a portion arbitrarily selected from that property; and the inevitable result is that the tax exacted from each company does not bear the same proportion to the whole tax as the value of its classified property bears to the value of all the property in the class.

To illustrate this conclusion: The total valuation of all the property in the State used for railroad and canal purposes is \$190,437,998. The total tax levied is \$1,273,670, which is equal to \$6.68 on each \$1000. The valuation of all the property of the Central R. Co. used for railroad or canal purposes is \$38,756,838. Its whole tax under the act is \$271,840, which is equal to \$7.01 on each \$1000. The valuation of all the property of the Easton & Amboy R. Co. used for railroad and canal purposes is \$8,638,062. Its whole tax under the act is \$53,115, which is equal to \$6.15 on each \$1000. The valuation of all the property of the New York, Susquehanna & Western R. Co. used for railroad or canal purposes is \$4,893,428. Its whole tax under the act is \$25,195, which is equal to \$5.15 on each \$1000.

These discrepancies in the rates of taxation do not spring from any errors of the assessors, but are necessitated by the statute itself; and no process of rational construction can conform the act to any rule of assessment which will obviate them, if the whole sum chargeable against each company is treated as an entire, indivisible tax. If, therefore, the court were shut up to this interpretation, I should be constrained to hold the whole tax invalid, because as

sessed in violation of the constitution. Hence the first indicated should be adopted, under which the tax of 1 per cent can be sustained.

It remains to consider whether this State tax is opposed by the fourteenth amendment of the federal constitution, which denies to any State from denying to any person within its jurisdiction the equal protection of the laws. The object of this provision, as declared by the supreme court of the United States, was to prevent unjust discrimination among persons, based upon differences of race or social position. *Slaughter-house Cases*, 16 Wall. 36. No such discrimination is servable in the imposition of this tax. The same court has expressly adjudged that a State law which designates a class of property as a class by itself, and provides a distinct mode of taxation for that class, but which requires the application of different methods to all constituents of the class, so that the law operates unequally and uniformly upon all persons in similar circumstances, denies to no one person the equal protection of the laws. The meaning of the constitution of the United States. *Railroad Tax Case*, 115 U. S. 321. The State tax is in no way unconstitutional.

One other suggestion deserves notice. It is that the court should look behind the statute for other enactments to support the local taxes against these companies. If this act had failed to impose any tax, I should have thought the court at liberty to say that where for legal taxation of railroad and canal property the first section of the act declares that the tax imposed by the act is in lieu of all other taxation upon the property subject to taxation under the provisions of the act; and, having concluded that the act does impose a tax upon all the property used for railroad and canal purposes in the State, no other tax on that property can be maintained consistently with the legislative will.

The judgment of the supreme court, so far as it annuls the tax of one half of 1 per cent, should be reversed.

PARKER, J. (concurring).—On the tenth day of April, 1884, an act was passed by the legislature of the State of New Jersey for the taxation of railroad and canal property. Under that act the Central R. Co. of New Jersey and other like companies were taxed on their property used for railroad and canal purposes. The validity of these taxes was contested in the supreme court, and they were by that court adjudged invalid, on the ground of the unconstitutionality of the act. An abstract of the act of 1884 is given in the opinion which has just been read by the chancellor, and I will not repeat it.

At the opening of the argument in this court, it was

that counsel would be heard on two questions, viz.: (1) whether, if the act of 1884 be invalid, there is any lawful method of assessing taxes upon said companies in reference to the subjects of taxation mentioned in the act; and (2) whether the act of 1884 is constitutional.

QUESTIONS
STATED.

In order to answer the first question the course of legislation in this State on the subject of taxation of corporations of this character should be considered. In the infancy of this class of corporations, when struggling for existence, the amount of the tax they were required to pay into the State treasury was smaller; the State favored them by limiting the annual tax to be paid by such corporations to the one half of 1 per cent on the cost of their respective roads. This tax was for State purposes, and they were not assessed for local taxes. The wide and liberal policy adopted by the State was founded in part on the fact that the enterprises in which such companies were engaged were, at that time, of doubtful success, and in part on the belief that, if successful, they would contribute vastly to the public good. As time progressed, these corporations extended their business operations, and acquired additional property, often of great value, until in some sections of the State, especially in the cities, the exemptions from local taxation became so great as to incumber the property of citizens liable to be taxed with a heavy burden.

To prevent injustice arising from inequality of taxation, and to equalize, as far as possible, the public burdens, the legislature, on the second day of April, 1873, passed an act the avowed object of which was to establish just rules for the taxation of railroad property. This act made a radical change in the system. It provided not only that railroad companies should pay, upon the cost, equipment, and appendages of their roads, a State tax at such rate as had been before fixed by law, but also, upon all real property of such companies owned by them (excepting the main stem, not exceeding 100 feet in width), a county and municipal tax for the benefit of the counties, townships, and cities of the State, respectively, where the same were situated, after the rate of 1 per cent; exempting, however, from such tax, land not exceeding 10 acres lying in one parcel at the *termini* of the respective roads. The law of 1873 was passed before the adoption of the constitutional amendment in reference to taxation, and therefore its validity cannot be wholly tested by the same standard as the act of 1884. But upon the question now under consideration, viz., whether, if the act of 1884 be invalid, there is any lawful method in the act of 1873 of making the assessments on the subjects of taxation mentioned in the act of 1884, it is sufficient to remark that, although based on the same general principle as the act of 1884, yet, inasmuch as by the act of 1873 the assessment was to be made on cost, and not on true value, as the constitutional

amendment prescribes, the act of 1873 will not survive assessments.

On the same day that the act of 1873 was approved ACT OF 1873. the governor signed what is termed the general railroad law, the nineteenth section of which provides that, after a railroad constructed under that act should be in operation, the owner owning it should pay to the State treasurer a tax of one per cent annually on the cost, equipment, and appendages of the road-bed, and also pay such other taxes as might be assessed from time to time by general law, applicable to all railroads. The legislature should have power for that purpose, and all railroads should be taxed for the value of their real estate (including the road-bed of 100 feet in width), and on personal property then taxed in the cities or townships where it should lie.

The act of 1876 providing for State taxes on railroads passed after the adoption of the constitutional amendment ACT OF 1876. The act is almost identical with the act of 1873. The object of the act of 1876 seems to have been to make the object of railroad taxation conform to the constitutional amendment. It took effect in 1875, which prescribed that the assessment should be on true value instead of on cost. Where the acts of 1876 did not conflict, the former stood; and under those acts both the State and local taxes on railroad property in the cities were assessed and collected up to the enactment of the law of 1884.

Upon an examination of those acts, in comparison with the act of 1884, it will be seen that they are grounded on the same principle. If the act of 1884 be unconstitutional, so is the act of 1876, and these assessments TWO ACTS GROUNDED ON SAME PRINCIPLE. therefore, be upheld under the act of 1876. They can they be supported by the general law of 1866, because that law has no reference to taxation on railroad and canal property. If the act of 1884 be unconstitutional and void, the sixteen sections of that act, which authorizes the supreme court to increase or reduce the assessment, will not avail, for the supreme court has no power to adjust or refer back an assessment made under an unconstitutional act, unless, after the original assessment, a new one has been passed whereby a legal assessment could be made. The decision of this court in construing the act of 1884 is in 45 N. J. Law, 157 (Elizabeth v. Meeker).

Where the principle on which the act rests is in conflict with the constitution, one part of the assessment should not be sustained, and the other part be sustained. In this case, there cannot be a separation of the parts without doing violence to the general scheme and running counter to the law-making power. If the act of 1884 is void as to the taxation of railroads, it is also a nullity as to State taxes.

Having seen that, if the act of 1884 be unconstitutional,

void, there is no lawful method of assessment upon these companies in reference to the subjects of taxation mentioned in such act, the vital question now arises whether the act of 1884 is constitutional. Upon the answer to this question depends the decision of this cause.

I agree with the supreme court in that part of the opinion which holds the act of 1884 not invalid because it directs that the valuation and assessment shall be made by a board of assessors especially appointed for that purpose. It matters not what the machinery set in motion by the legislature to execute a tax law may be, so long as the principle lying at the root of the act is not antagonistic to the constitution. Nor would it affect the case if such machinery be found defective, or if the board made mistakes. The act gives the supreme court ample power to correct mistakes in the application of the act.

Nor is the act of 1884 invalid because, in the ascertainment of the value of the property of the companies, the franchise is to be taken into account as one element of value. The opinion of the supreme court rightly holds "that this subject is not debatable at the present day, and the doctrine has become already accredited by many decisions as well of the federal as of the State courts."

One so-called vice of the act of 1884 is stated in the opinion of the supreme court in the form of an interrogatory. It is asked, "Whether, by law or constitution of the State, it is competent for the legislature, at will, to select the property of two classes of corporations, and impose a tax upon each property, at the same time exempting all other property from the burden." If the act of 1884 was the only tax law on the statute book, the answer should be that it was not competent to do so. But the act is only one of a series of tax laws under which property in the State is taxed. If, by virtue of the various tax laws in force, all the property in the State (except that which is devoted to collegiate, academic, religious, or charitable purposes) is taxed, how can it be said that the legislature, at will, selected the property of the two classes of corporations, and imposed a tax upon such property, and at the same time exempted all other property from the burden of taxation? All taxes are, in one sense, State taxes. They are assessed and raised under different laws enacted by the legislature of the State, all forming one general scheme of taxation, designed to bring all the property in the State (liable to tax) under general laws and uniform rules, according to its true value. Different agencies are employed to assess and collect, and the sums are applied to various public purposes. But this does not vitiate the system of taxation, nor render invalid any one of the acts which, with others, constitute the system, if the constitutional prohibition be not violated.

IMPOSITION OF A
TAX UPON TWO
CLASSES
OF
PROPERTY ONLY.

While the taxing power is an inherent attribute of State sovereignty, to be exercised only by the legislative branch of the government, yet it is controlled by constitutional limitations which the people have adopted. So long as the legislative branch of the government conforms to the constitution, it is supreme on the subject of taxation. It has the power and the right to enact that local officers in each taxing district shall assess and collect for their respective districts, the county, township, and city taxes, and distribute the money without its passing through the State treasury; or to enact that a State board shall assess and collect all taxes, and bring all the money into the treasury, in part to be distributed by the State among the municipalities; or to provide for a State board to assess and collect one portion of the tax, and a local board the residue. So long as all property (not exempt by statute) is reached and taxed according to its true value by general laws and uniform rules, it matters not whether the end be accomplished through one statute, or through many, forming one general system.

The mode of taxation under the act to establish a system of public instruction, approved March 27, 1874, is pertinent in this connection as an illustration. Under that act a State school tax was directed to be raised (in lieu of township school taxes), to be levied and collected by the local officers, to be paid through the several county collectors into the State treasury, and be redistributed by the State so as finally to reach the several school districts. This act is an instance of direction, by the legislature, of the specific channel into which a tax raised for a specific purpose may be made to go before it will reach the contemplated object. It shows the power of the legislature over the subject of taxation, restrained only by constitutional provisions. Another somewhat similar instance is the act in reference to insurance companies of the State, the thirty-ninth section of which requires that every company organized under the act shall pay (not as a license fee, but as tax) into the State treasury one quarter of 1 per cent per annum on its capital stock for the school fund. Foreign insurance companies are required not only to pay a license fee for the privilege of transacting business within the State, but also a tax of two per cent on all premiums received in the State, to be distributed among organized fire departments for the use of disabled firemen.

Enough has been stated to show the power of the legislature over the subject of taxation, and to demonstrate that, in forming a judgment as to the validity of a specified act, it must be taken in connection with all other laws operative on the same subject.

When the State government desires to raise a tax for State purposes, through the local officers in the several taxing districts, it becomes necessary to fix the amount to be raised, and ap-

SUPREMACY OF
LEGISLATURE ON
SUBJECT
OF
TAXATION.

MODE OF TAXA-
TION UNDER ACT
OF MARCH, 1874.

portion it among the counties on the basis of ratables; but when the State chooses to levy a State tax, direct, through the machinery of its own officers, selected for the purpose, an apportionment is not needed, and it is only required to ascertain the true value of the property to be assessed, and to fix the rate.

APPORTIONMENT
AMONG COUNTIES

It is alleged that the act of 1884 is unconstitutional and void because it violates the clause of the amended constitution which requires property to be taxed "under general laws and by uniform rules, according to its true value." In the arguments addressed to the court by the several counsel for the defendants in error this objection to the act was elaborated and enforced, and the court is called upon to consider this branch of the case very fully. In the first place, it will be observed that the word "all" is omitted from the sentence which contains the constitutional restriction on the power of taxation. This omission by the commission that prepared the amendment, and by the legislature that submitted it to the people, was not accidental. It was intended that some property should be exempt, and that upon the classes of property which the legislature saw fit to tax the assessment should be according to the true value and by uniform rules, affecting alike all property of a class. In the opinion of the supreme court in this case, it is conceded that the legislature has the power to classify property for the purpose of taxation; but it is maintained that a class must not be declared arbitrarily, and that it must arise out of the nature of the things classed. This is true; but is not property used by railroad and canal companies, for the purpose of their business, a class of property arising out of its nature? It is a class universally recognized as different from any other class in many respects. It is not the abstract value of the rails and ties as so much steel and wood, or of the land on which they rest as farm land or building lots, or of the tangible personal property in itself considered, which are alone to be taken into account in ascertaining the true value of property used for railroad purposes, but the franchise also, which puts life into what otherwise would be comparatively dead property, of little value. The true value of property used for railroad or canal purposes cannot be arrived at except in treating it as a class by itself. This view is sustained, not only by our common knowledge gained by observation, but is held by numerous decisions of the courts. In *Sinking Fund Cases*, 99 U. S. 722, Chief Justice Waite says: "Railroads are a peculiar species of property, and railroad corporations are in some respects peculiar corporations." In the case of *Louisville & N. R. Co. v. State*, Justice Matthews said: "The right to classify railroad property as a separate class for purposes of taxation grows out of the inherent nature of the property."

TAXATION "UN-
DER GENERAL
LAWS AND BY
UNIFORM RULES."
TRUE VALUE.

As has been seen already, the acts of 1873 and 1876 were

grounded on the same general principle as the act of 1873, it becomes important, in this connection, to see how the courts have practically regarded the acts. In the case of *State v. Mutchler*, 4 N. J. 96, a bridge within the main stem (100 feet wide) of said company was assessed for local taxes, and the company claimed exemption from such assessment under the act of 1873. Those laws existing on the subject of railroad taxation. Those laws were acts of 1873 and 1876 before mentioned. On page 97 of its opinion (delivered in 1879), said:

"The first section of the act for the taxation of railroads, passed by the Legislature of April 2, 1873, exempts from county, township and municipal taxation the main stem or road-bed and track of any railroad corporation, not exceeding 100 feet in width. The last act was modified by the act of April 13, 1876, but the provisions of the act of 1873 were not repealed. Its provisions, except so far as altered by the act of 1876, are still in force. In the respects mentioned, the act of 1873, in force, and lands held by such corporations, within the limits, are exempt from taxation for county, township and municipal purposes, if used exclusively for railroad purposes. The purpose of the act is to establish a uniform rule of taxation on this subject. A uniform rule must necessarily be the only rule applicable to an entire class of subjects embraced within the provisions of the act. It is, therefore, the intent, and, by implication, supersedes and excludes all other laws on the subject. The act of 1873 is expressly made applicable to all railroad corporations occupying or using railroads in this State, whether as lessees or otherwise."

The local assessment on the bridge was set aside. It does not appear that the question of the validity of the acts of 1873 and 1876 was raised, or that it suggested itself to court or to the Legislature on that occasion. The validity of the acts was taken for granted. The result was that the company had the benefit of the acts. If the acts had been declared exempt from the tax on the bridge, the acts would have been unconstitutional and void, the assessment would have been on the bridge was lawful.

In *Van Riper v. Parsons*, 40 N. J. Law, 8, the Supreme Court uses the following language, viz.:

"A law settling the methods by which all railroads become incorporated, would be special, in the sense that it would be confined in its operation to but a single kind of corporation, and so a law would be local, by this test, that should not be general. The organization, under one system, of all the municipalities in the State, as such law would manifestly have a local effect with respect to locality. But who, conversant with the usage touching these terms, would venture the assertion that such statutes as these would not be general laws? All laws are based, of necessity, on a classification of its subjects;

such classification is fairly made, and the legislation founded upon it is appropriate to such classification, it is as legitimate now as it would have been prior to the recent amendments to the constitution. If a set of objects be fairly classified, a law embracing them will be a general one, and in all respects unobjectionable."

The case of *Van Riper v. Parsons* came before the supreme court again, and on page 123, 40 N. J. Law, the syllabus of the decision is tersely stated thus, viz.:

"A law framed in general terms, restricted to no locality, and operating equally upon all of a group of objects, which, having regard to the purposes of the legislation, are distinguished by characteristics sufficiently marked and important to make them a class by themselves, is not a special or a local law, but a general law."

If property used for railroad and canal purposes be not distinguished from all other property by marked and important characteristics, it would be difficult to find any property which could be classified. It should be observed that, at the time the constitutional amendment was adopted, the act of 1873, which treated property used for railroad purposes as a separate class, was in force, and that feature of the act has never been changed.

The case of *New Jersey South. R. Co. v. Board R. Com'rs*, 41 N. J. Law, 235, was decided more than three years after the amendment to the constitution took effect. That opinion is founded on the assumption that the acts of 1873 and 1876, for the taxation of property used for railroad purposes, were constitutional and valid laws. The question of constitutionality was not, in that case, distinctly raised, but the validity of those acts was taken for granted and acted upon, as has been repeatedly done by the courts during a period of 10 years after the adoption of the constitutional amendment in reference to taxation. In the case to which reference is last made, the justice who delivered the opinion said:

"In 1877 a State tax was laid on each of these corporations by the board of railroad commissioners, pursuant to the provisions of the act entitled 'An act providing for State taxes on railroads, and a more efficient collection thereof,' approved April 13, 1876. These writs of *certiorari* were sued out to review the legality of such assessments."

The court held the assessments legal and properly made.

Although no case is reported wherein the constitutional objection to the act of 1876 or 1873 was expressly made, yet it appears by the files and records in the office of the clerk of the supreme court that each of the then justices had before him for review assessments on railroad property under the fourth section of the act of 1876, on claim of reduction, and that each justice proceeded

to act under that section as if the law was constitutional. In one case the validity of the act was attacked, but the justice disregarded the objection, and fixed the amount of the tax. A *certiorari* was taken, and to the return was attached, by counsel of the company, the following, viz.:

"The constitution of the State of New Jersey provides that property shall be assessed for taxes under general laws and by uniform rules, according to its true value. It is submitted that the statute under which the taxes in question have been assessed is not a general but a special law, applicable to corporate property in railroads only, and that the act is unconstitutional and void."

The *certiorari* in that case was dismissed for want of prosecution, but was reinstated by consent. The writ was again dismissed, and a writ of error taken, but the case was never brought to a hearing.

Under the act of 1876 large sums of money were each year collected as taxes on property used for railroad purposes and paid into the State treasury. After such action on the part of the State, and acquiescence on part of the companies for so long a period of time, under the acts of 1876 and 1873, the question of the constitutionality of a similar act is now raised. Such acquiescence on part of the companies affected may not be decisive upon the question of constitutionality now distinctly raised, yet the practical construction given by the courts, and acted upon by the companies, may be taken as some evidence of contemporaneous opinion. As was said by the supreme court in the case of *State v. Kelsey*, 44 N. J. Law, 1: "Such a course of practice may amount to a practical exposition."

The uniformity of rules in taxation which the constitution requires, is that uniformity which operates on the whole of a class. A tax upon property of railway corporations should be governed by uniform rules as to the property of all such companies used for railroad purposes. The act of 1884 now under examination is within this rule. It operates uniformly upon the property of all railroad corporations used for railroad purposes; being, as has been already demonstrated, a distinctive class, by reason of inherent qualities, and therefore not antagonistic to the constitutional requirement of uniformity.

Still another question has arisen which should here be disposed of. It is whether these companies are exempt from the assessments made under the act of 1884, by reason of the clause inserted in their respective charters that the tax of one half of 1 per cent is in lieu of all other taxes or imposts. This is accompanied by a subsequent clause, in the same connection, which provides that the charter may be altered, modified, or repealed. This provision is also expressed in the sixth section of the

EXEMPTION FROM
TAX BY CLAUSE
IN CHARTER AU-
THORITIES.

general corporation act. Charters of this nature have received construction repeatedly in the New Jersey courts.

In *State v. Jersey City*, 31 N. J. Law, 579, the justice who delivered the opinion of the court of errors, after quoting the clause in the charter of the company providing for the payment to the treasurer of the State annually by the company of one half of 1 per cent on the cost of the road, and that no other tax or impost should be assessed or levied upon said company, and that the legislature might at any time alter, modify, or repeal the same, said:

"The contract which is set up in the proviso in the 14th section of their charter, before cited, and which, following the provision fixing the annual sum they are to pay, declares that no other tax or impost shall be levied or assessed upon them. This designation of what they are to pay, connected with the proviso excluding all other burdens in the form of taxation, they contend forms a contract between them and the State. These statutory provisions form, in my opinion, a contract neither in letter nor spirit. They are to be read in connection with the other provisions in the charter, which reserves to the legislature right to alter, modify, or repeal."

In *State v. Miller*, 30 N. J. Law, 368, it is decided, in reference to the latter clause, that "the language extends to all the provisions of the charter." In *State v. Powers*, 46 N. J. Law, 300, it was adjudged, in effect, that such provision in a railroad charter was not a contract, and that a railroad corporation having a repealable charter was subject to additional taxation. In *Tomlinson v. Jessup*, reported in 15 Wall. 454, the supreme court of the United States held that "the reservation affects the entire relation between the State and the corporation, and places under legislative control all rights, privileges, and immunities, derived by its charter directly from the State."

Having considered the question of the constitutionality of the act of 1884 in all its bearings, after a careful examination of the organic law, and all the statutes relating to the assessment of taxes on railroad and canal property, and the authorities on the subject, I have reached the conclusion that the said act does not in any particular violate the constitution of the State of New Jersey, and that it is a valid law. The act in question is not only constitutional, but is founded on a just basis. While it requires of the companies the payment of one half of 1 per cent for State purposes, it so guards against imposition, in the assessment of local taxes, that in no case can a company be forced to pay more than the local rate, but may pay much less. If there be any inequality, it is favorable to the companies, and of this they have no legal right to complain. It is the injured party who has the right to move for the correction of errors.

But it is contended that the act of 1884 is in violation of the

CONFLICT WITH
FOURTEENTH
AMENDMENT TO
FEDERAL CON-
STITUTION—SAN
MATEO CASE.

fourteenth amendment of the federal constitution, which provides that no State shall deny to any person within its jurisdiction the equal protection of the laws. To sustain this contention the case of *County of San Mateo v. Southern Pac. R. Co.* is cited. A critical examination of that case leads to the conclusion that it does not have the slightest application to the question now before the court. The county of San Mateo brought suit against the company to recover State and county taxes claimed to be due from that corporation. The company had expended a large sum of money in the construction of its road, and, to secure a portion of its indebtedness, had executed a mortgage upon its railroad, rolling stock, appurtenances, and franchises, and also upon some land not used for railroad purposes. The board of equalization of the State of California assessed against the company taxes on the whole of its property, without any deduction from its value on account of the mortgage given upon it to secure its indebtedness. Under the constitution of that State, persons operating a railroad only in one county had the right to deduct from the valuation for mortgage debts, while those operating a railroad in more counties than one could not claim deduction therefor. There was also another distinction made in the constitution of California between railroad property held by individuals and that held by corporations, which worked inequality. In the opinion delivered by Justice Field, in the United States circuit court, in the *San Mateo Case*, he said:

"If we look at the scheme of taxation prescribed by the constitution of California for the property of railroad companies, we will perceive a flagrant departure from the rule of equality and uniformity, so essential in the distribution of the burdens of the government. Wherever an individual holds property incumbered with a mortgage, he is assessed at its value, after deducting from it the amount of the mortgage; if a railroad corporation holds property subject to a mortgage, it is assessed at its full value, without any deduction for the mortgage, and as if the property was unincumbered."

It will at once be seen that the facts in the *San Mateo Case* are different from those developed by an examination of the act of 1884; and how the decision in that case can be tortured into an authority to show that the act of 1884 violated in any respect the fourteenth amendment to the constitution of the United States is beyond my comprehension. The act of 1884 makes no such discrimination in the valuation of railroad property incumbered by mortgage as is made by the constitution of California. On the contrary, the act of 1884, in the tenth section, expressly provides that in case any railroad or canal company shall claim a deduction, on account of mortgage, or debt secured thereby, the State board of assessors shall allow the same, in the cases in which the local

assessors are authorized by law to allow a deduction in the case of any other owner of mortgaged lands.

Upon the whole case I am clear in the opinion that the act "for the taxation of railroad and canal property," approved April 10, 1884, is not unconstitutional and void, but is constitutional and valid in all its parts.

The judgment of the supreme court should be reversed.

REED, J. (partially concurring, partially dissenting).—1. The constitution does not require all property to be subjected to the imposition of a tax levy. At the time of framing the twelfth paragraph there were in existence several State constitutions in which, in variant shapes, was the provision that all property should be taxed. The commission which drafted our amendment deliberately refrained from employing the word "all." Nor do I understand that the assertion in the opinion of the supreme court, that the requirement was that all and not some property should be taxed, meant that a law, to conform to the constitutional standard, must impose a tax levy upon every kind of property. I think it could only have been intended to signify that all property must be subjected to the operation of tax statutes, but that the law may operate as well by way of exemption as by imposition. This seems apparent from the admission that it is within the scope of legislative ability to provide that certain kinds of property may be relieved from the burden of taxation, and from the recognition of property used for church, school, college, and the like purposes as a kind that may be exempted. This power of exemption was exercised in the general tax act of 1866, which statute was recognized in the case of *North Ward Nat. Bank v. Newark*, 39 N. J. Law, 380; s. c., 40 N. J. Law, 558, as a general law. Since then, in no case, in no argument, in no expression of judicial opinion, has the exercise of this power in the act of 1876 been challenged as opposed to the constitution.

2. If, then, the legislature can impose upon some and relieve other property from the tax rate, upon what rules must the separation of property for these purposes be made? I think it may be assumed that this cannot be done capriciously. Whether the legislature could so act, even if unfettered by a constitutional limitation, is not a question needing an answer now. That it cannot so act, in view of the twelfth paragraph of the constitutional amendment, is clear. The degree of the limitation is that both imposition and exemption must operate generally. Generality of operation has by a long line of cases been definitely settled to mean operation upon all of a class. Property must be taxed by general laws; namely, laws each of which includes all property included within its class. So, conversely, property must of necessity be exempted by a class or

ALL PROPERTY
NOT REQUIRED
TO BE SUBJECT
TO TAX LEVY.

RULE FOR CLASSIFICATION
OF
PROPERTY.

classes. The line which separates taxed from exempt must be a line which divides classes.

3. If taxation must be by laws each of which includes does property used for railroad purposes include a class

PROPERTY USED
FOR RAILROAD
PURPOSES AS A
CLASS.

Property may be classed by reason of its intangibles. Real estate and personalty, tangible and intangible property, are obvious instances of different classes which might be the basis of segregation for taxation on the basis of inherent qualities. But I think differences pressed upon property by reason of the purpose for which it is used, which differences may also be the foundation of classification. A college owns lands and buildings; so does the owner of a hotel. The former may own scientific apparatus and books; the latter may be a dealer in books and telescopes. The property of the owner of the hotel, under the tax act of 1876, exempt, but the same kind of property, if it is longed to the owner of a hotel or a dealer in scientific apparatus, is subjected to taxation. If the tax act of 1876 is a general act and the exemption clause in that act is to be regarded as resting upon a classification, then the exemption of the property of colleges, seminaries, and cemeteries, grounded entirely upon the classification arising by reason of use, must be considered as a violation of the right to elect property for taxation in accordance with the law. I think, also, that the use of property for railroad purposes is in a degree distinctive, as compared with all other uses of property. In the opinions of distinguished judges such property has been noticed as *svi generis*. It is impossible to think of property, in respect to its character, for the purposes of taxation, without connecting the tangible things themselves with the uses to which they are by which they are utilized. By reason of the manner in which property, under a railroad charter, a belt of land which stretches for miles, and hundred taxing districts is welded into something which, for the purpose of valuation, becomes a unit. Its property, both real and personal, is shaped and constructed for the attainment of a single purpose which, without a franchise peculiar to railway purposes, would be impracticable. The property, stripped of the power of utilization conferred by such a franchise, would be comparatively valueless. The graded road-bed, the track, the engines, the cars, for other uses than railroading, are of little worth; and railroading without the State's charter and privileges could be hardly considered a practical use of property. The public character of the functions which a railroad performs; its right to demand fares and freight charges; its exercise of the State's prerogative to condemn lands; its power to run trains across highways and through cities at a high speed; its power to carry an element which, with all its guards, is still an menace to adjoining property,—these are powers, while in some respects they may be common to

porations, are, in the aggregate, peculiar to railroad charters. Certainly, the purposes for which property is used under such a charter impress it with a distinct character, if we once admit that use can be the basis of classification. I conclude, therefore, that a law which includes in its operation all property used for railroad purposes is general.

4. Must property be taxed at a uniform rate, by reason of the requirement that property shall be taxed by uniform rules, as well as by general laws? The constitution does not require that property shall be taxed by a single rule, but by uniform rules. UNIFORM RATE OF TAXATION. If we assent to the proposition that property may be ranged into classes for any purpose of taxation, and also to the proposition that a law which includes all of a class is a general law, I am unable to perceive how a rule that also applies to a class lacks uniformity of operation. Judicial sentiment has been in favor of the view that the constitutional amendment was not intended to affect mere methods of procedure in levying or collecting taxes, but was designed to fix the rules by which the burden of taxation was to be distributed. Inasmuch as all property taxed is to be taxed at its true value by the express terms of the amendment, if it is also held that all property must be taxed at a uniform rate, then the power of classification is a barren privilege. Besides, I think it would follow from this construction that there is no power in the legislature to exempt property from taxation; and, conversely, if the admitted power to relieve a class or classes of property from taxation existed, how can it be said that uniformity of rule requires uniformity of rate to be imposed upon all property? And if there exists the power to deal with property so as to exempt a class entirely, there must exist the power to relieve a class partially as to rate, and so the right to legislate for classes, as to rate of taxation, must be recognized.

5. If the statute under consideration be valid as tested by the views above expressed in regard to the requirements of the constitution, so far as it provides for the imposition of a tax at the rate of one half of 1 per cent upon railroad property used for railroad purposes, I regard it as sound. It includes in its operation an entire class of property, and the imposition of a tax of one half of 1 per cent upon all property within this class is within the constitutional authority of the legislature. Nor do I think there is any doubt concerning the validity of the provision now involved, however, which taxes all property owned by railroad companies, but not used for railway purposes, in the same manner as other property of the same kind is taxed for local purposes. This property is segregated from other of such companies by the fact that it is used differently, or is unused, and so it is with propriety thrown into the mass of taxable property in the

several local taxing districts where it happens to be situated, taxed at the local rate.

But there is a further provision in the act for the taxation of the property owned by these companies, and used for the purposes of their business for local taxation. The provision selects all the property so used, including a main stem 100 feet in width and the passenger depots, and imposes upon the part of such property which is considered as belonging to each taxing district a tax at a rate of not exceeding 1 per cent. The act provides that there shall be several branch lines belonging to one corporation operated under one management, one of the said lines designated as the main stem and the others be taxed. The provisions of the act I am unable to regard as either general or particular in their operation upon a class. It exempts from taxation a strip of land 100 feet in width, with its tracks, and exempts passenger depots, whether within or outside of the main stem, but at the same time taxes other property similar in kind and used for the same purposes. The commissioners are empowered to select one of two or more lines owned or managed by the company, for exemption. The one selected is in no respect different from the others, which are left for taxation. And upon what ground can a passenger depot be put in one class and another depot in another? No ingenuity can discover here a ground for a classification which is not entirely illusive. It must be remembered that this exemption is not an accidental failure of something within the words of the act which might properly belong to the class, but it is a well-matured design to lighten the burden, in some instances the most important, part of the burden from the burdens imposed upon the remainder of the class. I am compelled to view it as an arbitrary selection of property for taxation and also for exemption, and so opposed to the twelfth paragraph.

It may be further observed that this lack of generality is accompanied in this, as I think in all cases, by want of uniformity in the operation of this part of the statute. Uniformity in operation requires an equality of operation upon all property of the same class. It means that each owner of property in the class shall bear his proportion of the tax levied upon the property comprising the class. If the value of the main stem and passenger depots of each one of all the companies in the State bears the same proportion to the value of its other property of the same class, then the practical operation of this part of the law would be uniform. But no such condition of affairs as this is conceivable as an existing fact. In truth, the proportions which the two classes of property bear to each other among the different owners vary greatly. The result is that the company having a large

WANT OF UNIFORMITY IN OPERATION OF STATUTE.

of outlying property is heavily taxed, while the company whose property consists almost entirely of main stem and passenger depots pays in comparison next to nothing. It is because laws of this kind operate in the way of discrimination in favor of some and adversely to other owners of the same class that they are prescribed by the constitutional requirement of generality and uniformity of operation. This part of the statute is, in my judgment, void for these reasons, and the local taxes levied under it should be set aside.

This part of the act is severable from those portions which provide for the levy of the tax for State purposes, and the record should be remitted to the supreme court for its consideration of those objections to the latter tax, other than constitutional, which were reserved.

SCUDDER, J. (concurring).—I have prepared an opinion stating my conclusions, without discussing the whole subject in controversy. The questions raised and discussed on the writs of error to this court relate to the validity of the act entitled "An act for the taxation of railroad and canal property," approved April 10, 1884; and whether, if said law be invalid, there is any other statute under which this court may make or direct a legal assessment. It is not necessary to add anything to what has been already said by other members of the court on the latter part of this proposition, and I entirely agree with the conclusion that no prior statute exists by which these disputed assessments against railroad corporations can be amended or sustained if this law be invalid or by which any new assessment can be substituted in the place of these by any action of this court. The former part of the proposition is more difficult to determine. Is this law invalid, so that it cannot be executed without violating the fundamental law of our State? If it be not thus controlled and annulled, it is the duty of JUDICIAL DISCRETION. this court to give it effect. It is not our province to say whether the law is impolitic, or even oppressive or unjust, in its provisions so long as it does not violate the constitutional rights of these corporations in the enforcement of what is designed to be a strictly tax law. The judicial power cannot legitimately question the policy, or refuse to sanction the provisions, of any law not inconsistent with the fundamental law of the State? *Cooley, Tax'n*, 34. The power to tax may be exercised oppressively upon persons, but the responsibility of the legislature is not to the courts, but to the people, by whom its members are elected. So, if a particular tax bears heavily upon a corporation, or class of corporations, it cannot, for that reason only, be pronounced contrary to the constitution. *Veasie Bank v. Fenno*, 8 Wall. 548.

A mere suggestion of these familiar passages of law, giving the well-defined duties and powers of the co-ordinate branches of our

government, will dispose of many points in the argument, and bring us to the real issue which we have the power to decide under the assignment of errors before us. The tax law, of which these railroad corporations complain, is unconstitutional? If so, this case is ended. If not, further process will correct its alleged defective execution. That part of the constitution which is said to be violated by its enactment is article par. 12: "Property shall be assessed for taxes under general laws and by uniform rules according to its true value."

There can be no question that this law imposes a tax on property, and it is not a franchise tax. By subdivision 4 of the act the value of the franchise is to be ascertained and included in ascertaining the true value of the property used for railroad and canal purposes, and a tax is imposed on this total valuation. All is designated as property, and is within the scope of this paragraph of the constitution. That the franchises of a railroad or canal company be thus valued and assessed for general taxes is abundantly justified both by authority and precedent in legislative acts and decisions of the courts. It has an appreciable market value in all cases easy to measure, and not always determinable by rule or estimate. Corporate rights and privileges by which the government are not mere abstractions, or so involve other property of the corporations that they cannot be separated. The land, road-bed, rails, buildings, and materials of a railroad are composed have a value, and the added worth of them by the uses to which they may be applied by the franchise of a franchise for such uses may be approximately, if not accurately, estimated. It has often been done, and sanctioned by the courts. How this may best be done must be left largely to legislative discretion and judgment. The whole aggregate property of a railroad is thus to be valued and brought together for taxation. The assessment is laid upon it to supply a revenue for the support of the State. This is an assessment of property for taxation within the above-cited paragraph of the constitution, and its terms, must be made under general laws.

This I hold is a general law, applicable to all the railroad and canal companies in the State, unless they are protected by special limitations of taxation in their charter, and in some cases, irrevocable contracts, and legislative control. Railroad corporations have peculiar qualities, which distinguish them from manufacturing corporations, or other public or quasi-public corporations. They have a right of eminent domain to condemn lands, conferred by their charter; in the uses to which their railroads may be put, as carriers of passengers and freight, receiving tolls for the same; in the employment of steam-power—

TAX ON PROPERTY AND FRANCHISE.

PECULIAR QUALITIES OF RAILROAD CORPORATION.

agency—in passing through the State; and their protection, in the careful use of such agency; in the structure of the road, with its rails, cuts, embankments, often built and maintained at a great detriment to other property; in the extent of the road, often through several counties, or across the State; in the depots, freight-houses, wharves, and the great accumulation of property at the *termini* and other points on the line of the railway. Canals have some of the same peculiarities in the construction and maintenance of their water-ways. These characteristics, which so clearly distinguish them from other corporations, make it almost a necessity that they should form a class by themselves; and the right to do this for taxation has been recognized in the charters of companies in our general railroad act, the general canal act, and laws passed prior to and since the amendments to the constitution in 1875, notably the tax laws of 1873 and 1876, all of which have been enforced and acquiesced in.

In the Kentucky Railroad Tax Cases, 115 U. S. 321; s. c., 6 Sup. Ct. Rep. 57, the classification of the property of railroads for taxation is recognized, and in the opinion of KENTUCKY TAX CASES. the court (Justice Matthews)—

“The right to classify railroad property as a separate class, for the purposes of taxation, grows out of the inherent nature of the property, and the discretion vested by the constitution of the State in its legislature; and necessarily involves the right on its part to devise and carry into effect a distinct scheme with different tribunals in the proceeding to value it.”

We have no right to assume that this discretion will be abused, and railroads taxed out of existence, as has been said, and to strain the power of the court to protect them in anticipation of such attempt at destruction. If the property of railroad and canal companies admits of this distinctive classification, founded on real differences, and not on mere devices for the manifest purpose to oppress and harass them by unequal taxation, then the law which classifies them for taxation is general, within the description of such a law, in the well-known and oft-quoted decisions of our own courts.

The word “all” does not precede the word “property” in the paragraph referred to, and property may therefore be classified, and even exempted from taxation, as is sometimes done, without violating the express words of the constitution.

Besides the requirement that property shall be assessed for taxes under general laws, it must also be assessed “by uni-“UNIFORM RULES.” form rules.” The word “uniform” is defined as “not variable;” “not different;” “having the same form or manner.” As it stands in this paragraph of the constitution, it means that rules must not be variable in their application to the subject of taxation included in the classification of property. In the Head

Money Cases, 112 U. S. 580, 594, in construing the clause of the constitution of the United States that "all duties, imposts, and excises shall be uniform throughout the United States," the court said: "The tax is uniform when it operates with the same force and effect in every place where the subject is found;" but that "perfect uniformity and perfect equality of taxation, in all aspects in which the human mind can view it, is a baseless dream, as this court has said more than once;" citing State Railroad Tax Cases, 92 U. S. 575, 612.

The rules for taxation must be uniform as to the property in the class on which it operates. As to railroad property, all property in that class must be assessed for taxes by the same rules. But suppose the law, by its uniformity, does produce unequal and unjust results in some cases, is it therefore to be annulled? Suppose, as in this case, that the main stem, which includes the road-bed not exceeding 100 feet in width, with its rails, sleepers, and depot buildings used for passengers connected therewith, is assessed at one rate, and the other real estate used for railroad purposes in each taxing district is assessed at another rate, and no good reason is assigned for such difference; or suppose, as in section 6 of this act of 1884, it is enacted "that whenever, in any taxing district, there shall be several branch lines of railroads belonging to or controlled by one company, or operated under one management, the assessors shall designate one of the said lines as the main stem, and the value of the others shall be included in the separate valuation provided for in the second subdivision of section 3 in this bill" (that is, the value of the real estate used for railroad purposes in each taxing district in this State other than the main stem), and that this rule, applied to some of the railroads, produces unequal and unjust results: will these invalidate the law in whole or in part? These inequalities arise mainly from the fact that some railroad corporations have acquired more of a certain kind of property than others, and they have extended their holding, in many cases, far beyond the width of 100 feet of the main stem of the road, as originally intended and provided for in their charters. If all are taxed alike for such excess, the rule of uniformity is not thereby violated. Have not the legislature the legal right to say that for the main stem of the road, 100 feet in width, which the original charter contemplated the railroad companies should hold and use, they will tax at the rate of one half of 1 per cent for State purposes, which was the amount fixed originally in most, if not all, of the charters, but for all acquired beyond 100 feet in width a greater tax shall be paid, not to exceed, in the aggregate of both taxes, the local rate as fixed and assessed for county and municipal purposes? The same rule is applied, by this separation, to all in the class, and they are by this law carefully guarded, not only against assessment at a

TAX MUST BE
UNIFORM AS TO
ALL PROPERTY
UPON WHICH IT
OPERATES.

higher rate than others of the class, but also against a higher rate than is imposed upon other property holders in the several taxing districts where their property is located.

The objection that the property of railroads, by this law, is not assessed by taxes according to its true value, because it can only be truly valued as an entirety, and not in parcels, as provided for in the act, is not well taken. The method of determining the true value of property must be left to the discretion of the legislature. If this value is fixed as the basis of taxation, the method and the agencies to be used to ascertain it belong to the legislative, and not to the judicial, province.

Nothing is said in the constitution as to the appropriation of taxes after they are assessed and collected. If, as in this case, one half of 1 per cent is reserved for State purposes, and 1 per cent be distributed for local expenses, for which APPROPRIATION OF TAXES AFTER COLLECTION. general taxes may be assessed, this court cannot interfere with such apportionment, for the reason that there is no restriction in the constitution of the power of the legislature to make such apportionment. This is but a convenient form of collection and distribution of taxes when collected, without increasing the general rate of either the individual tax-payer or the railroad and canal company.

It is argued that "the equal protection of the law," under the constitution of the United States, fourteenth amendment, exempts from any greater burden or charges than such as are "EQUAL PROTECTION OF THE LAW." FOURTEENTH AMENDMENT. equally imposed upon all others under like circumstances; and that this equal protection forbids unequal exactions of every kind, and among them that of unequal taxation. Admitting this to be so,—and I am not disposed to deny it,—the limitation to all persons and property in like circumstances restricts the comparison to all those within the same classification for taxation. This law does not stand alone in the classification of property for taxation, but it is part of a system of tax laws by which this burden is distributed among all classes of persons, and upon all taxable property, with slight exemptions, within the State, and taxes are thereby raised for the expenses of the State, county, and municipal governments in their different departments, and according to their several requirements.

Thus far, as it appears to me, there has been a fair effort, throughout the whole system, to place all persons and property, so far as may be practicable, within the equal protection of the laws, both constitutional and legislative. That there are errors in details, and in some of the methods of assessment, all will probably admit; and doubtless, when these are made plain by the practical working of the law, they will be corrected. But substantial and not exact equality is all that can be required under any system of legislation for taxes. Unless this law is manifestly wrong, it should be sus-

tained. In my opinion it is not, and the judgment is reversed.

Taxation to pay Salaries and Expenses of Railroad Commissioners.—Section four of chapter one hundred and twenty-four of the Laws of 1883, which provides for raising a fund for the payment of salaries and current expenses of the board of railroad commissioners, is unconstitutional and void, being in contravention of section 1 of the State constitution, which provides that "the legislature shall levy a uniform and equal rate of assessment and taxation." *Atchison v. Howe*, 32 Kan. 737.

Authority of Municipal Corporation to impose License Tax on Railroad Cars.—Authority granted by charter to the city of L. to impose a license tax on persons engaged in certain enumerated callings, and "upon any person or employment which it may deem proper, whether such person or employment be herein specially enumerated or not," does not empower the city to impose such a tax upon a railroad corporation doing business in the city. *City of Lynchburg v. Norfolk & Western R. Co.* (Virginia, Feb. 1884, 10 Law Jour. 377.

By defendant's charter (§ 2, chap. 513, Laws of New York 1884) to construct and operate a street railroad in the city of New York, subject "to the payment to the city of the same license fee as is paid by each car run thereon as is now paid by other city railroads in the city at the time the charter was granted two railroads in the city paid a license of \$50 per car each, one paid \$20 per car, and three paid no license fee." In an action to recover license fees, *held*, that the city was entitled to receive, and defendant was properly required to pay, \$50 per car each. Interest was properly allowed. *Mayor v. Broadway, etc.*, 10 R. 275.

Taxation of Income of Railroads cannot be imposed without the assent of the Legislature.—While the present constitution of Alabama requires that the income of corporations shall be taxed at the same rate that is imposed on the income of natural persons, the legislature, when the power is asserted, cannot tax the one at a higher rate than the other at a lower rate, yet, the first step in taxation being taken, the legislature, until that is done there can be no assessment or taxation of either; and when the legislature, through a failure to provide for a species of property free from taxation, by providing no machinery for its assessment, the courts are powerless to remedy the evil. *State v. Board of Revenue, etc., of Mobile Co.*, 73 Ala. 101.

Occupation Tax on Palace Cars—Constitutionality.—When a tax is imposed upon palace sleeping and dining cars run on the roads in this State, but such cars as are owned by the railway company are exempt, the tax is invalid as contrary to the constitutional provision that "all occupation taxes shall be equal and uniform upon the subjects." (Texas, Sept. 1885) 1 Tex. Ct. Repr. 321.

NIXON

v.

CAMPBELL *et al.**(Advance Case, Indiana. January 20, 1886.)*

The failure to locate a railroad through a township within a prescribed time is not a cause of forfeiture of a donation voted to aid in the construction of the road, provided the road is actually completed and the sum donated expended in its construction within the limits of the township. The order of the commissioners placing the tax on the duplicate is conclusive, in a collateral attack, of the fact that the railroad was located within the limits of the township.

Section 2 of the act of March 11, 1875, requires that a declaration of forfeiture shall be made by the board of commissioners; and in this respect the provision of the act of 1869, R. S. 1881, § 4060, is repealed and, unless such forfeiture is declared, the collection of the tax cannot be enjoined and, without such declaration, the failure to complete the railroad within the prescribed time will not work a forfeiture.

APPEAL from the Fountain County Circuit Court. Reversed.

This action was brought by a portion (101 in number) of the taxpayers of Van Buren Township, Fountain County, Indiana, for the purpose of obtaining a perpetual injunction, restraining the collection of certain taxes levied in aid of the Frankfort & State Line R. Co.

The complaint shows that at the regular June session, 1876, of the board of commissioners a petition was filed with the auditor and presented to the board, purporting to be signed by twenty-five freeholders and voters of Van Buren Township of said county.

Said petition showed that said railroad company was then duly incorporated, and asked that \$17,700 be appropriated by said township to aid in the construction of said railroad through said township, and prayed for an election to be ordered for the purpose of taking the votes of the legal voters of said township for and against said appropriation, and the levying of a tax therefor for said amount, the same being less than 2 per cent of the taxable property of said township on the tax duplicate of the county, delivered to the treasurer for the preceding year.

The board found that the petition was signed by at least twenty-five freeholders, and ordered an election for August 5, 1876. Notices were ordered and given and the election held.

A levy of 1 per cent was made at June session, 1877, and a levy of 1 per cent at the June session, 1878.

Marshall Nixon, now appellant, came in upon his petition,

showing that he was a voter and taxpayer of said township, and by order of court was allowed to defend.

After being admitted as a defendant, he filed his demurrer to the complaint and to each paragraph thereof and to each specification of the first paragraph.

The court then granted leave to the plaintiffs to amend their complaint by making Van Buren Township a party defendant, and the amendment was accordingly made.

Van Buren Township appeared and filed a demurrer to complaint.

Marshall Nixon then filed a demurrer to the complaint as amended and to each paragraph thereof and to each specification of the first paragraph.

The court sustained said demurrer to all the specifications of the first paragraph, except the seventh specification, and overruled the demurrer to the seventh specification, and to the second paragraph of complaint, and the parties respectively excepted.

The defendant, Marshall Nixon, then filed an answer in ten paragraphs.

Van Buren Township then filed an answer, admitting all the allegations of the complaint.

Plaintiffs filed a demurrer to the first eight paragraphs of the answer of defendant Nixon.

Henry P. Nixon, treasurer, and the board of commissioners were called and defaulted.

The court sustained the demurrer of plaintiffs to the 1st, 2d, 4th, 5th, and 6th paragraphs of the answer of Nixon, and overruled said demurrer as to the 3d, 7th, and 8th paragraphs, and the parties excepted.

Plaintiffs then filed a demurrer to the 9th and 10th paragraphs of the answer of Nixon.

The court sustained this demurrer to the 9th and 10th paragraphs of answer, and exceptions were taken.

The defendant, Marshall Nixon, then withdrew his 7th and 8th paragraphs of answer, and refused to answer further.

This left the 3d paragraph of answer in the record alone, which being addressed to the first paragraph of complaint only, left the second paragraph of complaint without answer. The plaintiffs, now appellees, thereupon took judgment on demurrer upon the second paragraph of their complaint.

The case is further stated in the opinion.

Nebeker & Dochterman for appellant.

W. E. Baker, J. McCabe, Charles M. McCabe, and L. P. Miller for appellees.

ELLIOTT, J.—Marshall Nixon is the sole appellant, those who were coparties with him in the court below having refused to join

in the appeal. As he is the sole appellant, the only errors which would warrant a reversal are such as affirmatively appear to have prejudiced his substantial rights, and as the record shows that the judgment against him rests entirely on the second paragraph of the complaint, he was not prejudiced by the rulings on the first paragraph, even if they were wrong. It is, therefore, neither necessary nor proper for us to discuss the rulings on the first paragraph of the complaint, and we pass them without further notice.

The second paragraph of the complaint alleges that the plaintiffs are taxpayers and citizens of Van Buren Township, FACTS. Fountain County; that at the June session, 1877, the board of commissioners, pursuant to a petition of twenty-five freeholders previously filed, ordered that a donation of \$17,700 be made to the Frankfort & State Line R. Co. to aid in constructing a railroad through the township; that the board ordered a levy of a tax to pay the amount donated, and directed that it be placed upon the duplicate; that "The company failed to locate its line of railroad or to commence work thereon in said county or township within three years from the levying of said tax; that the company failed for more than three years after the tax was placed upon the duplicate of the county to expend in the actual construction of the road in the said township an amount of money equal to the amount of the donation; that the company had failed to complete its road for use through the township at the time this action was commenced, although five years has elapsed since the 7th day of March, 1877; and that no extension of time has been granted to the company by the board of commissioners. It also appears from the statements of the complaint that the tax has been placed on the duplicate; that the treasurer threatens to collect it, and asserts that it is a lien upon the property of the plaintiffs. An injunction restraining the collection of the tax is prayed.

The grounds upon which the validity of the tax is assailed are these:

1. The failure to locate the railroad through the township until April, 1881.
2. The failure to expend in the construction of the road a sum equal to the amount of the donation within three years after the tax was placed on the duplicate.
3. The failure to complete the railroad through the township within five years from the 7th day of April, 1877.

In our opinion the first of these grounds is not available. There are two reasons for this conclusion. First. The failure to locate the road within a prescribed time is not made a cause of forfeiture by the statute; Second. The order placing the tax on the duplicate decided that the road was located, and this decision cannot be collaterally impeached. Of these, in their order:

FAILURE TO LO-
CATE ROAD
WITHIN PRE-
SCRIBED TIME.

five years after said tax has been placed upon the duplicate for collection in the proper county, have expended, in the actual construction of such railroad in said county or township, an amount of money equal to the amount of money to be donated to or stock to be taken in said railroad company, by said county or township, the board of commissioners may, in its discretion, make an order annulling and cancelling such subscription of stock or donation of money upon the application of twenty-five freeholders."

The provisions we have quoted require that a declaration of forfeiture shall be made by the board of commissioners, so that in this respect, at least, they are inconsistent with the provisions of the former statute; and, under many decisions of this court, it must be declared that to that extent the earlier statutes are repealed. *Marion Co. v. Center Township*, *supra*; *Sellers v. Beaver*, 97 Ind. 111; *State v. Board*, 92 Ind. 499; *Caffyn v. State*, 91 Ind. 324; *Board of Tipton Co. v. Indianapolis, P. & C. R. Co.*, 89 Ind. 101; *Wilson v. Board*, 68 Ind. 507.

These decisions also require us to hold, as we do, that unless there is an adjudication by the board of commissioners, in the manner provided by statute, declaring a forfeiture because of a failure to make the expenditure prescribed, the collection of the tax cannot be enjoined.

The third ground relied upon by the plaintiffs, as entitling them to an injunction, is also disposed of by the cases to which we have referred, for those cases decide that the failure to complete the railroad within the time prescribed will not, without a declaration to that effect by the board of commissioners, work a forfeiture of the rights of the railroad company.

Judgment reversed with instructions to sustain the demurrer of the appellant to the second paragraph of the complaint.

Railroad Aid Tax—Committeeman of Town acting as Agent for Railroad.—One of the members of the committee appointed by the town to work up the tax having entered into a contract with the railroad company, *held*, that the tax voted was void by reason of a promise made by him to voters that if such aid was voted they would be paid 50 cents on the dollar on their certificates when they paid such tax. *Chicago, etc., R. Co. v. Shea* (Iowa, Dec. 1885), 25 N. W. Repr. 901.

PEOPLE

v.

NORTH PACIFIC COAST R. Co.

(Advance Case, California. February 24, 1896.)

In an action, brought under section 3670 of the political code of California, to recover delinquent taxes assessed against a railroad operated in more than one county, the plaintiff, upon a judgment in its favor, is not entitled to recover interest on the taxes, at the rate of two per cent per month, from the time they became delinquent. Section 3803 of such code only authorizes such interest on the taxes mentioned in the sections immediately preceding it.

APPEAL from judgment of the superior court of the city and county of San Francisco. The opinion states the facts.

W. T. Baggett and James A. Waymire for the appellant.

W. H. L. Barnes for the respondent.

BELCHER, C. C.—This is an action to recover taxes assessed for the year 1883, upon the defendant's railroad, situated in Marin and Sonoma counties. The action was commenced under the provisions of section 3670 of the political code, and in the

FACTS. court below judgment was entered in favor of the plaintiff for the full amount claimed for taxes, with five per cent added for non-payment, and ten per cent for counsel fees and for costs. The appeal is by the plaintiff, and the only question presented for decision is, Was the plaintiff also entitled to recover interest on the taxes at the rate of two per cent per month from the time they became delinquent?

The question is answered by the political code.

In 1883 an act was passed by the legislature amending sections 3664 and 3665 of that code, and adding thereto other sections numbered consecutively up to 3671. Statutes and Amendments to Codes 1883, p. 65. By these sections full provision is made for the assessment of all railroads operated in more than one county in this State, and the collection of the taxes levied upon such assessments.

POLITICAL CODE. The assessment is to be made by the State board of equalization in the month of August, and within ten days after the third Monday of that month the board is to apportion the total assessments to the counties, or cities and counties, in which the roads are located. The board must prepare each year a book to be called "Record of Assessment of Railways," in which must be

entered each assessment made by the board, and another book, to be called "Record of Apportionment of Railway Assessments," in which must be entered, among other things, the total assessment and the amount of the apportionment of such assessment to each county, and city and county. Duplicates of these two books are to be made and transmitted to the controller of state, and they "constitute the warrant for the controller to collect the State and county, and city and county taxes levied upon such property assessed by the board."

Within ten days after the fourth Monday in October, the controller is required to publish a notice that he has received the "duplicates," and that the taxes are payable and will be delinquent on the last Monday of December, at six o'clock P.M., and that unless paid to the State treasurer at the capitol prior thereto, five per cent will be added to the amount thereof. All taxes not paid before the time named are delinquent, and thereafter there must be collected by the State treasurer, or other proper officer, an addition of five per centum.

NOTICE
OF
DELINQUENT
TAXES—PRO-
CEDURE.

After the first Monday of February of each year the controller is required to commence an action in the proper court, in the name of the people of the State, to collect the delinquent taxes, and the form of the complaint to be used by him is prescribed.

In the complaint it is alleged that the defendant is indebted to the plaintiff for State and county taxes in certain sums, "with five per cent added for non-payment," and judgment is asked for the several sums named.

If in such action plaintiff recovers judgment, there must be included in the judgment as counsel fees such sum as the court may determine to be reasonable and just.

In all of these provisions, as is seen, nothing is said about interest, and it is not claimed for appellant that they authorize the collection of interest. But it is urged that under section 3803 of the same code, interest at the rate of two per cent per month on certain delinquent taxes may be collected, and that that section should be construed to apply to taxes such as are sued for in this action.

We are satisfied that the section cannot be so construed. It refers only to the delinquent taxes mentioned in the sections immediately preceding it, and has no application to other taxes than those so mentioned. *Harper v. Rowe*, 53 Cal. 236; *Lake County v. Sulphur Bank Q. M. Co.*, 4 West Coast Rep. 191.

If it had been intended that interest should be collected on all taxes which the controller might sue for and recover, the complaint, formulated by the legislature for their collection, would, in our opinion, have demanded judgment for that interest, as well as for the "five per cent added for non-payment."

The judgment should be affirmed.

SEARLS, C., and FOOTE, C., concurred.

By the COURT—For the reasons given in the foregoing the judgment is affirmed.

Taxes assessed as Lien upon Land.—The statute providing that taxes assessed upon real property shall be a lien thereon from and to the first day of May in the year in which they are levied until they are paid has no application to lands conveyed to the St. Paul, M. & N. W. R. Co. in July, before the taxes for the year are assessed on such land; but to land thus acquired at such time the 3-per-cent provision found in defendant's charter applies, and supersees the provision to assess the land *in specie*. *State v. St. Paul, etc., R. Co.* (1885), 24 N. W. Repr. 196.

PEOPLE *ex rel.* SEIPP, Collector, *v.* CHICAGO AND WESTERN INDIANA R. CO.

CHICAGO AND WESTERN INDIANA R. CO. *v.* PEOPLE

(*Advance Case, Illinois. January 25, 1886.*)

Rolling stock and railway track, as well as capital stock of companies, are to be assessed by the State board of equalization; but property is to be assessed by the local assessors.

Sections 40, 41, and 42 of the revenue act (2 Starr & C. §§ 40-42) construed together provide that property held by a company for right of way is to be listed in its schedule of "railway property." It is not necessary that the road should be actually constructed "located" and in process of construction, the property held for right of way is assessable as railway track. The facts that lots held for right of way, by a company which is building its track, have buildings which are occupied, and that the company permits such occupancy to continue during the construction of the track, will not change the character of such property.

APPEALS from county court, Cook county.
E. R. Bliss and *Frank Adams* for people.
Charles M. Osborn for railway company.

SHELDON, J.—At the July term, 1883, of the county court of Cook county, on the application of the county collector for payment for the unpaid taxes of 1882, objections having been made by the Chicago & Western Indiana R. Co. to the judgment against certain lands described in a bill of sale, the court overruled the objection as to certain of the property, rendered judgment for the taxes, and from this judgment the railroad company appealed. The court refused to enter judgment as to certain other of the property mentioned in the list

this judgment the collector appealed. It was agreed that both appeals should be considered together.

It appears that in accordance with section 41, chapter 120, of the revenue act (Rev. St. 1874, p. 865), the Chicago & Western Indiana R. Co. made its schedule of property, denominated "railroad track," for the year 1882, and returned it to the county clerk of Cook county. In this schedule was included by specific description all of the property which is embraced in both of these appeals. The return was made upon a form furnished by the State auditor under section 273 of the revenue act, and named "Schedule A." Together with Schedule A the railroad company was furnished with another form named "Schedule D," upon which it was required to list for local assessment all its real estate other than "railroad track." Schedule D was returned with the word "none" written upon it. All of this property returned in Schedule A was assessed by the board of equalization, and the taxes extended upon this assessment the county collector collected of the railroad company. The local assessor, conceiving that these lots in question were improperly listed by the company in Schedule A, as a part of its "railroad track," proceeded to make an assessment of them himself, and upon this assessment made by him the taxes were also extended, and it is for these taxes judgment here was asked.

Rolling stock and railroad track, as well as capital stock, are to be assessed by the State board of equalization; but all other railroad property is to be assessed by local assessors. *Chicago, B. & Q. R. Co. v. Siders*, 88 Ill. 325.

The material question arising, then, is, were the lots included in Schedule A by the company properly denominated "railroad track," under the revenue law? as, if they were, the local assessor had no power to assess them; if they were not, then the board of equalization had no power to assess them, and the assessment by the local assessor was valid.

It is provided by section 40 of the revenue act that every corporation "owning, operating, or constructing a railroad in the State shall return sworn lists of schedules of the taxable property of such railroad." By section 41 of the same act such railroad corporations are required to file

with the county clerks of the counties through which the railroad is located a statement of the schedule showing the property "held for right of way," and the length of the main and all side and second tracks, etc., and the value of the improvements and stations located on the right of way. New companies shall make such statement in May next after the "location of their roads." By section 42 "such right of way, including the superstructure of main, side, or second track, and turn-outs, and the stations and improvements of the railroad company on such right of way, shall

SCHEDULE OF
PROPERTY AC-
CORDING TO
REVENUE ACT.

ASSESSMENT OF
ROLLING STOCK
AND TRACK.

REVENUE ACT,
SECTIONS 40, 41,
AND 42.

be held to be real estate, for the purposes of taxation, and inated 'railroad track,' and shall be so listed and valued.

It thus appears that it is not necessary the road should be constructed, but if it shall be "located" and in process of construction the company is to make the returns provided by law, that all property which it holds for right of way should be placed in its schedule of "railroad track." The question as respects the railroad and the property

thereon, on May 1, 1882, as appears from the evidence, was whether the railroad company was constructing its railroad; that it had the road over the property, and had purchased all of the lots mentioned in these appeals, for its right of way, and had done so for that purpose; that it had not acquired all the intervening lots, but was proceeding by condemnation and purchase to acquire all, so as to make continuous lines of road, and so as to acquire it all for tracks and stations; but that it had not, on May 1, 1882, continuous lines of track over the property.

The property is situated mainly north of Twelfth street, south of Van Buren street, they being east and west streets, and situated between Third and Fourth avenues, running north and south in the city of Chicago. The railroad operated from the south to a temporary passenger depot at Van Buren street. There were at that time four tracks across Twelfth street, connecting with the tracks south, but these tracks were north of the south line of Twelfth street. Two tracks were built across each of the intervening cross-streets up to Van Buren street; but there was not a continuous line of track across Twelfth street. The road had been located to Van Buren street. The company had suits for condemnation pending as to the amount of the other intervening property between Twelfth street and Van Buren street, and was negotiating for the purchase of the remainder. It had failed in some of the lots acquired in the condemnation of them for the tracks. Some of this property actually occupied had buildings upon it, and some of these buildings were occupied by tenants under the railroad company.

The position taken by the collector is that it was not the property upon which tracks were laid, or as was in actual use by the company for railroad purposes, that could be properly classed as "railroad track." And the collector held with the collector in part, overruling the company's objections as to all lots actually occupied by a building, and sustaining them as to lots which were vacant. We find no good reason for this distinction. The accidental occupancy of some of the lots having buildings upon them at the time they were purchased by the railroad company, and the occupancy of the lots having buildings being suffered to continue under the company, should make a difference. The lots were not purchased for the

LOCATION OF
ROAD—"RAIL-
ROAD TRACK."

SITUATION OF
TRACE

WHAT IS TAX-
ABLE AS "RAIL-
ROAD TRACK."

of their occupancy by dwellings, or for the use of drawing rents from them, and were not by a fair interpretation being held for such a use. But they, together with the vacant lots, were alike all purchased for railroad purposes, for right of way, and were alike all "held for right of way;" and we think the improved and unimproved lots should be similarly viewed as to being "railroad track" or not. We regard it a too narrow construction that the property must have been in actual use by the railroad company for railroad purposes, to admit its being classified as "railroad track." The requirement of the statute is that Schedule A shall show the property not actually used for right of way, but "held for right of way." And we are of the opinion, where property is circumstanced as all this was, the road being in process of construction, and the property in good faith acquired and held for right of way, and the delay of its immediate use for such purposes coming only from the non-acquirement of intervening property which was being obtained, that such property is to be considered as much a part of the "railroad track," as denominated in the revenue law, as if tracks had been actually constructed upon it. Five lots, it is admitted by the company's counsel, were improperly listed in Schedule A, but not one of these lots is involved in either of the appeals.

The judgment as to the lots included in the collector's appeal will be affirmed, but as to the lots included in the railroad company's appeal, the judgment will be reversed, and the cause remanded.

Railroad Bonds—Not taxable as "Public Stocks and Securities."—Bonds issued by a railroad corporation which is managed by its stockholders for the purposes of private gain are not "public stocks and securities" within the meaning of the Pub. Sts. of Massachusetts, c. 11, § 4, but are "debts due," and the money invested in them is "money at interest," from which the owner is entitled, in determining the amount for which his personal estate shall be taxed, under that statute, to have money upon which he is paying interest deducted, although the corporation is established by an act of Congress of the United States, and large grants of land have been made to it by Congress to aid in its construction for public purposes, and the bonds are secured by a mortgage on its road, and the mortgage is, as required by law, filed and recorded in the office of the Secretary of the Interior, and the corporation is to some extent subject to government control. *Hale v. County Commissioners*, 137 Mass. 111.

Tunnels, Tracks, Structures, etc., taxable as Real Estate.—The tunnels, tracks, structures, superstructures, stations, viaducts, and masonry known as the Fourth Avenue Improvement in New York City are taxable as real estate against the railroad company having the exclusive use thereof for its corporate purposes; the occupation of the public street in which the tunnels, etc., are situated having been appropriated to the use of the railroad company. This is so, although the city was compelled, under chapter 702, New York Laws of 1872, to pay a portion of the expense of the improvement. *People v. Commissioners of Taxes, etc.* (New York, Jan. 1886), 1 Central Repr. 809.

Non-resident Holder of Shares in a Domestic Corporation. A resident holder of shares in a railroad corporation in North Carolina is liable to tax there. Such property is beyond the jurisdiction of the State and subject only to that in which the holder has his domicile. *Lincoln R. Co. v. Commissioners of Alameda*, 93 N. C.

FREMONT, ELKHORN AND MISSOURI VALLEY R.

v.

COUNTY OF BROWN *et al.*

(*Advance Case, Nebraska. January 6, 1886.*)

Brown county was created in March, 1883, being attached to Holt county under the general statute, for election, judicial, and revenue purposes. In June, 1883, the county commissioners of Holt county levied school and school taxes upon the property in Brown county. In July, 1883, an election was held for county offices, and officers elected who entered upon the duties of their offices. In April, 1884, the Fremont, Elkhorn & Missouri Valley R. Co. paid to the treasurer of Holt county the taxes levied by the county commissioners of that county on the railroad property in Holt county. *Held*, that the taxes should have been paid to the treasurer of Brown county.

Upon the organization of a new county and the election and appointment of its officers, the ligament which bound it to the county to which it was attached for election, judicial, and revenue purposes is severed, and must thereafter be transacted with the new county.

INJUNCTION.

Joy, Wright & Hudson and H. C. Brome for plaintiffs;
W. H. Munger for defendant.

MAXWELL, J.—This is an action to restrain the treasurer of Brown county from collecting from the plaintiff the taxes levied by the commissioners of Holt county on the property of the plaintiff in Brown county in the year 1883. The cause is submitted on the following stipulation:

“It is hereby stipulated and agreed by and between the named parties that the above cause be submitted to the court on the following statements of facts and conditions:

“(1) That plaintiff is a corporation duly organized and incorporated under the laws of the State of Nebraska, owning and operating a line of railroad from Fremont, in the State of Nebraska, northwest, through the counties of Dodge, Cuming, Madison, Antelope, Holt, and Brown, in said State, with depot, tracks, side tracks, depots, right of way, bridges,

other property necessary and used in the construction and use of said railroad, and plaintiff was such a corporation and owned said railroad at the various times hereinafter mentioned.

"(2) That the county of Holt, in said State of Nebraska, is a corporation duly organized and created under and in pursuance of the laws of said State, and was such corporation at the various times hereinafter mentioned.

"(3) That the defendant the county of Brown is now one of the counties of said State organized under and by virtue of the provisions of the acts of the legislature of the State of Nebraska, which took effect September, 1883, entitled 'An act to provide for the organization of new counties, and to locate the county seats thereof,' and amendments thereto, and found in article 11, c. 17, of part 1 of the Compiled Statutes of Nebraska; that said county of Brown did not become permanently organized until the twenty-third day of July, 1883, and the officers elected at the first election therein did not qualify until the seventh day of August, 1883; that in pursuance of said act of said legislature last aforesaid, the governor of the State of Nebraska, on the eighteenth day of March, 1883, appointed commissioners to call an election in said county for the purpose of electing county officers in said county, and determining the location of the county seat therein; that said election was called by said commissioners, and held on the nineteenth day of July, 1883, and the same was the first election ever held in said county, and the votes cast at said election were canvassed on the twenty-third day of July, 1883, and the officers elected at said election did not qualify until the seventh day of August, 1883; that the defendant John N. Staley is now the treasurer of said county of Brown.

"(4) That the boundaries of what is now the county of Brown were fixed by an act of the legislative assembly of the State of Nebraska in the year 1883, which took effect February 19, 1883, and all of said territory included in said boundaries by said act was named and entitled the 'County of Brown.'

"(5) The said territory embraced and included in said county of Brown, as now organized, was situated directly west of said county of Holt; said county of Holt being, in the year 1883, and for several years prior thereto, duly organized. The said territory now embraced in said county of Brown was, by virtue of the laws of the State of Nebraska, attached to the county of Holt, for election, judicial, and revenue purposes, and the county authorities of said county of Holt, under the provisions of said statute, exercised control over, and their jurisdiction extended to, all the territory embraced in what was afterwards Brown county.

"(6) That under and by virtue of the provisions of the act of the legislature of the State of Nebraska proved March 1, 1879, found in Compiled Statutes of Nebraska, in article 1, c. 77, pt. 1,

the proper accounting officers of plaintiff, on or about 1883, listed, and returned to the auditor of public accounts of said State, for assessment and taxation, the property of said plaintiff, as provided by section 39 of said statute, which report showed the number of miles of said railroad in such county of the State, and the total number of miles of said railroad in the territory which now comprises the county of Brown. Said return disclosed that said company had 57.36 miles of said railroad in the county of Holt then organized, and that it then had 51.70 miles of said railroad in the territory which has since become (but not then organized) the county of Brown 51.70 miles of said road; that, in pursuance of the provisions of section 40 of said statute last aforesaid, a return was made by the plaintiff to the auditor of public accounts of the State board of equalization of said State of Nebraska, and assessed the value per mile of said railroad of plaintiff, and returned to said auditor, and on or before the 15th day of June, 1883, the said auditor certified to the clerk of said county of Holt the assessment per mile of said State board on said railroad, and the said mileage of said railroad in Holt county, and in the territory which now comprises the county of Brown, and the value of said railroad in Holt, and in the territory now comprising the county of Brown, was received by said county clerk of Holt from said State authorities for taxation, the said territory then embraced in what is now the county of Brown being then attached to Holt county for revenue purposes.

"(7) That the county commissioners of the county of Holt, on the fourteenth day of June, 1883, and while said county of Holt was still attached to said county of Holt for revenue purposes, duly levied taxes upon all of the taxable property in said county of Holt, and upon all of the taxable property in said territory which now comprises the county of Brown, including taxes upon the assessment made by said State board of equalization of plaintiff's railroad in said county of Holt, and in said territory now comprising the county of Brown, and all assessments made by said State board in said year 1883, upon all property for taxation in Holt county, and in the territory now embraced in the county of Brown (including the plaintiff's said railroad assessed by said State board), by assessors elected or appointed in said Holt county, and by said county commissioners of the county of Holt, in pursuance of the levy of taxes for the year 1883, levied a State tax of 14 mills, and county tax of 14 mills, and school taxes (certified up to the auditor of Holt county by the several district boards), upon the valuation of the plaintiff's road in Holt county, and in the territory attached thereto as Brown county, as well as on all taxable property therein; that the total taxes thus levied by the county commissioners of Holt county on the assessed value of plaintiff's railroad in said territory now comprising the

Brown amounted to the sum of \$7141.01; that the said taxes thus levied by the commissioners of Holt county on the plaintiff's railroad in the territory now embraced in Brown county were carried out on the tax-books of Holt county against said plaintiff's property, and the same delivered to the treasurer of said Holt county for collection, as by law required, with the warrant thereto, signed by the county clerk of said county, commanding the treasurer of said county of Holt to collect the same as by law provided.

"(8) That on or about the twenty-fourth day of April, 1884, the said taxes so levied by the county of Holt on the plaintiff's said property in the county of Holt, and in the territory now comprising the county of Brown, being due, the said tax-list being in the hands of the treasurer of said Holt county for collection, the plaintiff paid in to the treasurer of Holt county on said day, in good faith, but with notice of the permanent organization of said Brown county, said taxes so levied against the said railroad in Holt county, and in said territory now embraced in the county of Brown, and paid all taxes assessed and levied on its property for the year in said territory aforesaid, and received a receipt from said treasurer of Holt county therefor.

"(9) That the county authorities of Brown county never at any time levied any taxes whatever upon any property in said county of Brown for the year 1883, and never levied any tax for said year on said railroad of plaintiff in said county of Brown, and said county of Brown was not organized at the time when, by law, the counties in said State of Nebraska are required to levy the taxes, but the taxes on all the property subject to taxation in said territory now comprising the county of Brown were levied by the proper authorities of Holt county.

"(10) That immediately after the permanent organization of said Brown county, and in the month of August or September, 1883, the county clerk of said county of Brown obtained, from the tax-books of Holt county a transcript of said tax-list or tax-roll for said year of 1883 of the taxable property within said Brown county, including the said property and railroad of this plaintiff, and filed the same in the office of the treasurer of said county; the said tax-list being the taxes levied and carried out on plaintiff's property by the county authorities of Holt county aforesaid; and said transcript of said tax-lists so obtained by said county clerk of Brown county from said Holt county is claimed by said Brown county to have been done under section 13, art. 11, c. 17, pt. 1, p. 172, Compiled Statutes of Nebraska.

"The foregoing are the facts with regard to the matters therein stated and agreed to as such by the parties to this action; and in addition thereto the plaintiff claims that the county of Brown never made any claim or asserted any right to any tax upon plaintiff's said railroad for said year 1883, before the plaintiff paid

the same to said county of Holt; but, on the contrary, disclaimed any right to receive or collect the same from plaintiff before plaintiff paid said taxes to said county of Holt, and the plaintiff paid said taxes without any knowledge or notice of any claim thereto on the part of said Brown county. Which proposition defendants deny. And it is agreed by the parties hereto that if the court shall be of the opinion that said statement of facts, as last above stated, and to which said parties do not agree, is material to a proper determination of this case, then the said parties may take evidence, in the manner of taking depositions, upon said question, and the truth of said statement be determined by the court from such evidence, said deposition to be taken within such time as the parties shall agree upon or the court direct.

"The said parties, from the foregoing facts, submit for the judgment of the court the following: First. Did the taxes levied by Holt county upon the property of the plaintiff within the territory now comprising the county of Brown, for the year 1883, belong to the revenue of Brown county? Second. If so, did the payment of said taxes in full by plaintiff to the treasurer of Holt county on the twenty-fourth day of April, 1884, discharge plaintiff's liability for said taxes to Brown county? Third. Under the agreed facts, is plaintiff now liable to said Brown county for said taxes of 1883, levied as above stated, and paid by plaintiff to Holt county?

"FREMONT, ELKHORN & MISSOURI VALLEY R. Co.

"By JOY, WRIGHT & HUDSON, Attorneys.

"W. H. MUNGER, Attorney for Brown county."

Section 140 of chapter 18, Comp. St., provides that "All counties which have not been organized in the manner provided by law, or any unorganized territory in the State, shall be attached to the nearest organized county directly east, for election, judicial, and revenue purposes," etc. Section 147 provides that "the county authorities to which any unorganized county or territory is attached shall exercise control over, and the jurisdiction shall extend to, such unorganized county or territory the same as if it were a part of their territory." Section 1, art. 11, of chapter 17, provides that "when it shall be made to appear by the affidavit of three resident freeholders in any one of the unorganized counties of this State that such county contains a population of not less than two hundred inhabitants, and ten or more of such inhabitants, being tax-payers, may by memorial petition the governor to appoint three persons therein mentioned to act as special county commissioners, and one person by them named to act as special clerk for such county, and shall also name some place centrally located in the county for a temporary county seat; whereupon it shall be the duty of the gov-

UNORGANIZED
COUNTY.

PROVISIONS FOR
ORGANIZATION
OF COUNTY.

error to appoint and commission the persons so named for special county officers, and shall, by appointment under his hand and seal, declare the said place the temporary county seat of said county." The second section requires the officers thus appointed to take an oath. The third requires the commissioners to divide the county into precincts, and to fix the time and places where an election will be held, and cause notices thereof to be given,—the notices to specify the place of voting. The fourth section provides the mode of conducting the election. The fifth to the twelfth, inclusive, relate to the county seat. The thirteenth section provides that "whenever any county organized under the provisions of this chapter shall have been previously attached to any other county for election, judicial, and revenue purposes, it shall be the duty of the county clerk chosen at the first election, after having qualified according to law, to procure from the proper officer of such county a transcript of all deeds, mortgages, judgments, and liens, of every description, upon real and personal property lying and being in such newly-organized county, and cause the same to be recorded in the proper offices of his own county. Such clerk shall be at full liberty to take such transcripts himself; and when recorded in the proper office in his own county, shall stand headed with the name of the county and offices where taken, and a certificate attached thereto that they are correct; and such clerk shall receive for his services ten cents per folio for recording them, and ten cents per mile in going after and returning with them, which shall be audited, allowed, and paid to him by his own county." Section 14 provides "that county and precinct officers elected at the first election as herein provided shall continue to hold their respective offices until the next general election held for the same offices in other counties, as provided by the election law in force at that time, and until their successors are elected and qualified." The third section provides for the election of county and precinct officers.

It will thus be seen that the attachment of an unorganized county to one that is organized, for election, judicial, and revenue purposes, is merely of a temporary character; nor need the relation continue longer than sufficient time to organize after the unorganized county contains 200 inhabitants and tax-payers. The unorganized county does not become a part of the organized one, but, for certain purposes therein named, is placed under its care. The object evidently was to protect life and property in the unorganized county, and prevent a failure of justice. For the purposes named in the statute—election, judicial, and revenue—the organized becomes, as it were, a trustee for the unorganized, and this relation continues until the proper officers are elected and have been qualified in the new county; in other words, until the unorganized county becomes

ATTACHMENT OF
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organized and the officers elected at the first election have taken the oath and given the security required by the statute. The new county has then provided the machinery for county government and put the same in motion. It is now able to transact its own business, and it would seem both unjust and unreasonable to deny it and its citizens the right. Being an organized county, the ligament that bound it to the former is severed by the force of the organization, and it takes its place as one of the counties of the State, and its officers are amenable to the courts for the faithful performance of their duty. The county clerk of the new county is to obtain "a transcript of all deeds, mortgages, judgments, and liens of every description upon real or personal estate lying or being in such newly-organized county." While the language in terms, perhaps, does not include tax liens, yet we think they are intended to be included. Otherwise it would have been unnecessary to provide for the election of a county treasurer. Why provide a treasurer if the tax-rolls are not to be placed in his possession, and the revenue collected and dispersed by him upon warrants properly drawn? It is evident, therefore, that the transcripts referred to include the property assessed and the taxes levied in the new county. This being so, after the organization of the new county is complete and its officers have qualified, all taxes due to it are to be paid to its treasurer; and a payment to the treasurer of the county to which it was formerly attached is not a payment to it. The fact that the taxes were levied by the commissioners of the former county under a special power gives that county no authority to collect such taxes, if in the mean time such special power has ceased, as the object of the statute is not to enable the organized to make the unorganized a source of revenue.

It is clear, therefore, that upon the organization of Brown county and the qualification of its officers it became an organized county, and the special authority of the county officers of Holt county ceased. A payment, therefore, after that date, to the treasurer of Holt county of taxes due to Brown county for 1888, upon property lying therein, was not a payment to Brown county, and not a valid payment of said taxes. Said taxes, being paid under a mistake, in justice should be repaid to the plaintiff or offset against other taxes due from the plaintiff. But that question is not in this case.

The injunction must be denied, and the treasurer of Brown county permitted to collect from the plaintiff the taxes in question.

TAXES SHOULD
HAVE BEEN PAID
TO TREASURER
OF BROWN
COUNTY.

ATCHISON, TOPEKA AND SANTA FE R. Co.

v.

WILSON, Treasurer, etc., *et al.**(Advance Case, Kansas. April 9, 1886.)*

The county board of equalization is authorized, at its meetings held in the month of June of the odd years, when proper notice has been given to correct and equalize the assessment made in those years, under section 69 of the Kansas tax law, of real property that has become taxable since the regular assessment of such property in the even years, and therefore at such time the owners of such property have an opportunity for a hearing at which to contest the legality and justice of the assessment.

ERROR from Hodgeman county.

A. A. Hurd and M. W. Sutton for plaintiff in error.

W. S. Kenyon and H. C. Peck for defendants in error.

JOHNSTON, J.—In February, 1883, the boundaries of Hodgeman county were changed by legislative enactment so as to embrace considerable territory that had theretofore constituted a FACTS part of the unorganized county of Gray, and which before that time was not subject to taxation. The Atchison, Topeka & Santa Fe R. Co. owned several tracts of land in the territory attached, and in the spring of 1883 the assessors of Hodgeman county assessed this land of the company, and it was placed on the tax-roll, and a levy was made thereon by the county commissioners of Hodgeman county for the taxes of that year. The railroad company brought this action against the county treasurer and county commissioners of Hodgeman county, alleging that the assessment was made without authority, and that the taxes levied upon its lands were wholly illegal and void, and asked for an injunction to restrain the collection of such taxes. A temporary injunction was granted. Afterwards the defendant filed a demurrer to the petition, which, upon the hearing, was sustained, and the injunction dissolved. This ruling is assigned for error here. The validity of the tax is challenged by the plaintiff on the ground that the assessment of its land having been made in an odd year, it was not afforded a hearing or an opportunity to contest the justice of the assessment. We cannot concur in this claim. It is true that section 43 of the tax law provides for a biennial assessment of real property, but section 69 of the same law provides that "each township and city assessor shall annually, at the time of taking the list and valuation of personal property, also take a list of all the real property situated in the county that shall have become subject to

taxation since the last previous listing of property therein, with the value thereof estimated agreeably to the rules prescribed for the listing and assessing of real estate, . . . and shall make return thereof to the county clerk at the same time he is required by law to make his return of personal property," etc.

It is insisted that the board of equalization can only meet to equalize the assessment of real property in the even years when real property is regularly assessed, and therefore that the assessment of real property in the odd years provided by section 69 cannot be revised or equalized by the board. It is true that section 74 requires that there shall be a meeting of the board of equalization for that purpose on the first Monday in June of the even years, but it does not forbid a meeting at other times when there may be a necessity therefor. Section 73 reads as follows: "The board of county commissioners of each county shall constitute a county board of equalization, and the county clerk shall be the clerk of said board." This provision is broad and general, and, unless limitations are elsewhere prescribed, it would authorize the board thus constituted to equalize or correct the assessment of real estate at any time when proper notice had been given that such action could or would be taken. With respect to the equalization of the valuation of personal property, a limitation is prescribed in section 74, where it provides that the board "shall meet on the first Monday of June of each year, and proceed to equalize the valuation of the personal property of their county, and may adjourn from time to time for said purpose not beyond ten days from the first day of their session." Under this limitation it may well be doubted whether the board can meet for the purpose of equalizing the personal property valuations after the 10-day limit has expired; but when the legislature came to prescribe rules for the government of the board in regard to the time and manner of equalizing the valuation of real property, there was no such limitation made. The rules affecting real-estate valuations are found in the same section with the limitation mentioned. The fixing of the limit in the one case, and the studied omission of such a provision in the other, indicates that the legislature did not intend to restrict the board, in correcting and equalizing the valuation of real property, to the meeting held on the first Monday of June of the even years. Besides, by section 75 it is made the duty of the county clerk to give a newspaper notice in May of every year that the board will meet on the first Monday of the following month, and that at such meeting all persons feeling themselves aggrieved can appear and have all errors in the return corrected. As has been seen, the return made by the assessor in the odd year embraces, in addition to the listing and valuation of personal property, an assessment of all real property that has become taxable since the regular assessment of such property the preceding year. The

MEETING
OF
BOARD OF EQUA-
LIZATION.

notice is not that the errors in that part of the return relating to the valuation of personal property will be corrected, but that all persons may appear and have all errors in the return corrected. These sections, taken together, furnish authority to the board of equalization to correct any errors in the assessment of real estate made under section 69 in the odd years. That being so, that plaintiff had an opportunity for a hearing, and to contest the fairness and justice of the assessment. The judgment of the district court will therefore be affirmed.

(All the justices concurring.)

Assessment—County Assessors not authorized to assess Railroad Property.—Under the act of 1871 (Laws of Missouri, p. 56; 2 Wag. Stat. p. 1214 b, art. 2) county assessors were not authorized to assess the lands of railroad companies situated within their counties, but all railroad property was required to be valued and apportioned, as provided by said act, by a special board consisting of the State treasurer, State auditor, and register of lands, and the county courts of the several counties in which such property was situated levied taxes for county purposes upon the apportionment certified to the county clerks of such counties by such special board, as required by law. *State v. St. Louis, etc., R. Co., 82 Mo. 688.*

Same—Injunction against Board of Examiners.—The board of examiners organized and acting under the Tennessee statute will not be enjoined from certifying the record of the assessment of railroad property for taxation, and delivering the same to the comptroller, nor will the comptroller be enjoined from receiving said record and certifying said assessments to the counties and towns of the State, and from taking steps to collect any taxes claimed by the State upon said assessments in excess of amount admitted to be due, as such assessments may be reviewed by the writ of *certiorari* and *superedeas* in the State court. *Louisville, etc., R. Co. v. Bate et al., 23 Fed. Rep. 480.*

Same—Levy by County Supervisors Ultra Vires.—By Virginia acts 1879–80, ch. 106, § 1, the legislature, for the first time, empowered the supervisors to levy a tax on the real estate of railroad companies whose roads pass through their county, prescribing that such tax should be equal to the tax imposed upon other property for county and school purposes, and based upon the assessment per mile of the same property made by the State for its purposes. For State taxation no assessment was made on railroads until September 28, 1881; and an assessment thereof for county taxation, if made by the supervisors before that time, would have been *ultra vires*; but if made after that time it was valid, though the supervisors had previously made their levy as to property generally in the county. And if the clerk of the supervisors failed to enter an order made by them, they may amend their record by having the order entered *nunc pro tunc*. *Shenandoah Valley R. Co. v. Supervisors of Clark Co., 78 Va. 269.*

County Auditors acting as Board of Assessors—Increase of Amount Imposed by State Board.—Where the county auditors of the several counties along the line of a certain railroad, at their annual meeting, held for that purpose, acting as a board of appraisers and assessors of the property of said railroad for purposes of taxation of that year, apportioned for such purpose, of the total valuation of the property of such company in the State, to a certain county, for purposes of taxation, a certain amount of the valuation,—an increase in such amount imposed by the State board of equalization is

unauthorized by law; and where such increase creates a discontinuation against such company in favor of other companies of the same class, it is in violation of the uniformity clause of the State constitution, and of the Fourteenth Amendment of the Constitution of the United States guaranteeing "equal protection of the laws." *Baltimore, etc., R. Co. v. County Treas. of Seneca Co. (Ohio, May, 1885), 1 Western Rep. 94.*

Act creating State Board of Equalization—Constitutionality.—A statute creating a State board of equalization which vests power in such board to increase the valuation of the property of a railroad company located within the limits of a particular county, beyond the valuation as apportioned to such county by the county auditors of the several counties, along the line of such railroad, acting as a board of appraisers and assessors of such class of property, is unconstitutional and void; and in so far as it fails to provide for a hearing of the property owner, and the production of evidence as to the value of such property, it is in violation of the Fourteenth Amendment of the Constitution of the United States, guaranteeing the right to "due process of law" in all cases of divestment of the property of citizens.

The collection and enforcement of a tax levied upon an apportionment unauthorized by law will be perpetually enjoined. *Baltimore, etc., R. Co. v. County Treasurer of Seneca Co. (Ohio, May, 1885), 1 Western Rep. 94.*

Car-trust Company—Rolling Stock taxable in Boston as Personal Property employed in Business.—A number of persons formed an association, by an instrument in writing containing numerous articles, for the purpose of buying, selling, and leasing railroad rolling stock, to be sold or leased to a certain railroad company, with provisions for admitting other persons to membership. The members of the association were to furnish money for the purchase of the rolling stock, and were to have certificates for the amounts so furnished, providing that the principal sum contributed by each member should be repaid in ten annual instalments, with interest; both principal and interest being payable only out of the rentals received for the rolling stock. A plan was adopted by which the association delivered the property to a corporation as trustee, which issued the certificates to the members of the association, and also executed the leases to the railroad company, with provisions for a rental sufficient to meet the above payments of principal and interest, in addition to expenses, including taxes; and at the end of ten years the rolling-stock was to become the property of the railroad company. All contracts relating to any business of the association, involving liabilities for the payment of money, were to be in writing, and made under the direction of the board of managers. The original board of managers was named in the articles of association, but the shareholders were to have the power to remove them and to elect others. At all meetings, every shareholder was to have one vote for each share of stock owned by him, and provision was made for the transfer of shares, and the association was not to be dissolved by the death of members. Every owner of one or more shares was to be entitled to a proportionate share of the rentals received. The meetings of the board of managers were always held in B., and all the business done by them for the association was done there, and the association never had any other place where its business was carried on, and the certificate-holders never held any meeting. *Held*, that the association was a partnership; that its place of business was in B.; that rolling stock bought in pursuance of a vote of the board of managers authorizing such purchase, delivered to the corporation as trustee, and leased by the trustee to the railroad company, was personal property employed in the business of the association, within the *Massachusetts Pub. Sts. c. 11, § 24*; "and that under the *Pub. Sts. c. 11, § 20, cl. 5*, such property was taxable to the trustees in B. *Ricker v. American Loan & Trust Co., 140 Mass. 346; s. c., 12 Am. & Eng. Corp. Cas. 1.*

Rolling Stock to be assessed by State Board.—Sleeping cars owned by a non-resident corporation having no principal place of business within the State, which are in the possession of and under the control of a railroad company, under a contract to continue for a long term of years, and used by it for the same purposes as their own cars, have the same *situs* as articles of the same class owned by such railroad. Such property must be assessed by the State board, under section 2251 of the general Colorado statutes of 1877; the county officials have no jurisdiction to make such assessment. The return of such property must be made to the State board by the proper officer of the railroad. Whether the railroad using such cars is required to pay the taxes levied upon them, not decided. *Carlisle v. Pullman Palace Car Co.* (Colorado, May, 1885), 6 West Coast Repr. 707.

Assessment—Ad Valorem Tax—New Returns.—Executions for taxes were issued against the Southwestern R. Co. by the comptroller-general, contested, carried to the supreme court of the United States, and two thirds or more of the company's road and property had been relieved from the *ad valorem* tax. *Held*, that the company ought to have made a new or revised return. Having failed to do so, the comptroller-general was authorized to correct the original returns, and to assess that portion of the road and property subject to the tax from the best information he could procure, and order the *fi. fas.* to proceed for so much of the tax as was then due and unpaid. Had he done so, it would have been the act of the State. *State v. Southwestern R. Co.*, 70 Ga. 11.

Taxation of Road operating in Other States—Consolidation.—The general railroad law of Michigan made roads that lay partly within and partly without the State, taxable on so much of their gross receipts as corresponded to the ratio of their local to their entire length. A local company was consolidated with a foreign one that controlled a number of other consolidated roads and several leased lines besides, but the corporation reported its receipts in gross, without discriminating between its own roads and those that were leased, and was assessed accordingly, as if it constituted a single line. *Held*, (1) that it was not estopped by its report from disputing the legality of the assessment; the proper course was for the commissioner of railroads to require more definite information from it as a basis of assessment; (2) the foreign corporation was not taxable upon its entire system, but only upon the Michigan road which had been consolidated therewith. *Chicago, etc., R. Co. v. Auditor-Gen'l*, 53 Mich. 79.

Taxation of Rolling Stock—Return of Earnings—Transportation within the State.—Under Laws Wisconsin, c. 853, the Pullman Palace Car Co. is only required to return the gross earnings it derives from the use of its cars in transporting passengers from point to point within the State, and not its earnings derived from transportation from points outside of the State to points within the State, or from points within the State to points outside of the State, or from a point outside of the State to another point outside of the State, when the cars used in transporting from such last-mentioned points pass through the State or any part of it. *State v. Pullman Palace Car Co.* (Wisconsin, June, 1885), 23 N. W. Repr. 871.

License Fee for Railroad Companies—Mode of computing upon Earnings.—In ascertaining the basis of the license fee for operating a railroad agreeably to section 1213, Rev. St. of Wisconsin, the earnings for the whole year should be considered, and the computation made upon them, rather than upon the earnings of a fractional part of the year; and when one company commences operating a road early in any given year, and the same was operated by another company during the preceding year, the earnings of the latter company form the proper basis for computing the license fee to be paid by the company first mentioned.

In computing the license fee according to the mileage of a road, the spur

tracks should be included; and if the road be rented, the license fee should not be computed upon the balance accruing to the lessee road after paying rent, but upon the gross earnings. *State v. McFetridge* (Wisconsin, June, 1885), 24 N. W. Repr. 140.

MANSFIELD

v.

NEW YORK CENTRAL AND HUDSON RIVER R. Co.

(*Advance Case, New York. April 13, 1886.*)

Plaintiff and his partner contracted to erect an elevator within five months, to commence work within five days after notice by defendant's engineer of the completion by it of the foundation, with \$500 for each day gained, and \$500 forfeit for each day exceeding the five months, and brings this action for damages caused by delay through defendant not completing the foundation before giving notice. All proof tending to show this cause of action was excluded by the court on the ground that there was no covenant on the contract to have the foundation ready. *Held*, that the defendants were bound to prepare the foundations so as to have them in a condition to enable their contractors to prosecute their work to the utmost advantage and economy before giving the notice which set the time limited for its completion in motion.

That the act of the contractor in commencing the work within five days after receipt of the notice in question did not constitute a waiver, as he did it under protest.

That the fact that the assignment made to plaintiff of his partner's interest was not valid did not constitute a bar, as he was entitled to his damages thereon.

Plaintiff offered a judgment roll on an action brought by him against his partner to compel him to reform said assignment obtained after this action was brought. *Held*, competent.

APPEAL from judgment general term supreme court, second department, affirming judgment in favor of defendant.

RUGER, C. J.—This action was brought to recover the damages arising from a breach by the defendant of a contract made by it on April 5, 1876, with Gill & Mansfield for the construction of an elevator. The complaint alleges, as a breach, that the defendants failed to have the foundations ready for the erection of the elevator at the time they were required to commence work for its construction, and claim damages therefor by reason of increased expense in doing the work and supplying materials, and loss of gain or profits arising from the delay occasioned by the want of readiness on the part of the owners.

Upon the trial all proof on the part of the plaintiff tending to

show the cause of action set out in the complaint, with the damages arising therefrom, was objected to by the defendant, and excluded by the court, under the plaintiff's exception. The decision of the court seems to have been based upon the assumption that there was no covenant on the part of the defendant to have the foundations ready at the time of giving notice thereof, and such seems to have been the opinion of the general term in affirming the judgment.

An examination of the terms of the contract is necessary to determine the correctness of the views taken by the courts below. That instrument provided, among other things, that Gill & Mansfield should furnish the materials and perform the work in erecting the superstructure of an elevator over the water upon piers in the Hudson river, between Sixtieth and Sixty-first streets, in New York, and should finish the same within five months from the time of the commencement of the work, and should receive, as their compensation therefor, the sum of \$331,500, and the further sum of \$500 per day for each day less than that time occupied in its construction. It was further provided that they should pay the defendant, as liquidated damages, the sum of \$500 per day for each day in excess of that time during which the completion of the work should be prolonged. With respect to the time of the commencement of the work it was provided :

"The said parties of the first part hereby further agree to commence the erection of the elevator within five days after notice from the engineer that the foundations are ready, and to complete the same, ready for use of all the lofting elevators, within five months thereafter." "Whenever the word 'engineer' is used in the specifications, reference is had to the engineer in chief in charge of the work for the party of the second part to this contract."

It seems to us that the courts below have mistaken the plain reading and import of this contract. It is true that there is no express provision in it requiring the foundations, or any part of them, to be ready at any particular time. So neither is there any such provision requiring any foundations at all to be built by the owners; but the clearest implications arise from the language of the agreement, and its avowed object and intent, that the property of the owners upon which the building was to be erected should be prepared for the superstructure by such owners, and that the contractors should have notice whenever that time arrived. It was the indispensable condition to the performance of any of the obligations incurred by the contractors that the foundations should be prepared, and unless they were to be so prepared it rendered the whole contract motiveless and nugatory.

It is not denied by the respondents but that the duty of preparing the foundations was assumed by them, but it is urged that

there is no provision in the contract requiring them to have all of the foundations, or any particular portion of them, ready at the time of giving notice of readiness stipulated for in the agreement. In this we think they are mistaken. It was made the duty of the owners, not only to prepare the foundations for the reception of the work of the contractors, but also to notify them through their agent of the fact of such readiness. The terms of the contract plainly imply that the notice was to be of an actually existing condition, and not the expression of an opinion on the part of the engineer that the foundations were sufficiently advanced to enable the contractors to prosecute their work advantageously. The contractors have not submitted any such question to the decision either of the owners or their engineer, and in view of the heavy obligations assumed by them it would have been unwise and hazardous to have done so. There is no rule of construction, or principle of law, which will justify a party who is required by contract to give notice to another of the existence of a fact upon which important obligations depend, to do so untruly, or in such a manner as to prejudice the contractual rights and privileges of the party entitled to notice. It was held by this court in the case of *Peck v. Collins*, 70 N. Y. 382, that notice of readiness to perform implies readiness on the part of the party giving such notice, and, if he was not in fact ready, neglect to perform on the part of the other party constitutes no default. It is a well-settled principle of law in the construction of contracts that when the obligation of performance by one party presupposes the doing of some act on the part of the other, prior thereto, the neglect or refusal to perform such act not only dispenses with the obligation of performance by the other, but also entitles him to rescind, or, when rescission will not afford him an adequate remedy, to continue the work, and recover such damages as the delinquency has occasioned against the defaulting party. *Cross v. Beard*, 26 N. Y. 88.

The meaning of a contract is to be gathered from a consideration of all of its provisions, and the inferences naturally derivable therefrom as to the intent and object of the parties in making it, and the result which they intended to accomplish by its performance. It was said by Allen, J., in *Booth v. Cleveland Mill Co.*, 74 N. Y. 21:

"There is no particular formula of words or technical phraseology necessary to the creation of an express obligation to do or forbear to do a particular thing, or perform a specified act. If, from the text of an agreement, and the language of the parties, either in the body of the instrument or in the recital or inferences, there is manifested a clear intention that the parties shall do certain acts, courts will infer a covenant in the case of a sealed instrument,

or a promise if the instrument is unsealed, for non-performance of which an action of covenant or *assumpsit* will lie."

It was said by Judge Danforth, in *New England Iron Co. v. Gilbert Elevated R. Co.*, 91 N. Y. 165, that "although the defendant does not in express terms undertake to do the act or give the notice which shall set the plaintiff in motion, a promise to do so" "is clearly to be implied from the covenants and stipulations which were inserted." "There is manifested a clear intention on the part of the defendant to construct the railway, and for that purpose do certain things; among others, raise the money, provide the masonry, and give instructions to the plaintiff. These things, and others on the part of the defendant, the plaintiff by the contract acquired an interest in having performed, and there is an obligation for their performance to be implied in its favor."

The language used in these authorities is peculiarly applicable to the case in hand, and furnishes a safe and just guide by which to determine their rights.

Looking at this contract in the light of decisions referred to, it would seem that the plainest principles of justice required the implication of a covenant on the part of the defendant to prepare the foundations in question so as to have them in a condition to enable the contractors to prosecute their work to the utmost advantage and economy before giving the notice which set the time limited for their completion in motion. Any other construction would destroy the mutuality of the agreement, and put it practically in the power of one party to defeat performance by the other.

It is quite obvious that the provisions of the contract in respect to time are of its essence, and were regarded by the parties as of primary importance; the contractors being stimulated to great diligence by the prospect of extraordinary compensation therefor, and deterred by the certainty of great pecuniary loss from dilatoriness or delay in the prosecution of their work. A construction which enabled the railroad company to retard the prosecution of the work by the contractors, or disabled them from employing all of the agencies or force which, in their judgment, could wisely and advantageously be used in its performance, would operate as a fraud upon them, and render their covenant to complete the work in five months a reckless and foolhardy undertaking. The very assumption of such a covenant on the part of the builders implies an understanding on the part of all parties that they were to be unrestricted in the employment of means to perform it, and that nothing which it was the duty of the owner to do to enable the contractor to perform should be left undone. It is unreasonable to suppose that the parties intended to enter into obligations providing for the performance of work by one party, under a heavy penalty for non-performance within a

TIME OF ESSENCE
OF CONTRACT.

given period, which yet left it optional with the other to facilitate or retard such work at its pleasure or discretion.

It is also claimed by the respondent that the act of the contractor in commencing the work within five days after receipt of the notice in question constituted a waiver of the breach complained of. The evidence establishes the fact that immediately upon the receipt of the notice, the contractors protested against the act of the defendant, and claimed that it was given in violation of the true meaning and spirit of the contract, and that the foundations were not only not ready, but were in such a condition that they could not commence or prosecute their work except at increased expense and great disadvantage. Under the solicitations of the engineer, however, as they offered to prove, and without waiving any rights secured to them under the contract, they in fact commenced the prosecution of the work. There is nothing in the facts upon which an intention to waive the damages arising out of the breach complained of can be predicated. When the breach occurred the contractors undoubtedly had the option offered them of refusing to commence their work until the foundations were actually ready, or to commence and prosecute it, relying upon the covenants of their contract to recover such damages as the breach occasioned them. *Starbird v. Barrons*, 38 N. Y. 231; *Ruff v. Rinaldo*, 55 N. Y. 664; *Cross v. Beard*, *supra*. After express notice to the defendants of their intention to hold them liable for the damages arising from the omission to complete the foundations, they elected to commence the prosecution of the work. This they were entitled to do, and it constitutes no waiver of their claim.

The further objection is taken that no valid assignment of the claim in suit was made by his copartner in the work to the plaintiff. The objection that Gill was a necessary party to the action is not taken by the answer; and, assuming that the assignment was invalid, it does not constitute a bar to the action, because the plaintiff still had such an interest in the contract as entitled him to maintain an action for his damages thereon. Independent, however, of this objection, we are of the opinion that the assignment in question was sufficient in itself, or so ambiguous on its face as to authorize parol evidence to explain its meaning. The instrument in question purported to assign to the plaintiff all of Gill's right, title, and interest to any and all claims and demands which the late firm of Gill & Mansfield have had or now have against the New York Central & Hudson River R. Co. "for, on account of, and arising from any and all award or awards due said firm from said company under a certain contract for the erection of a grain elevator at the foot of Sixteenth street, in said city, by reason of said Gill & Mansfield having completed the construction of said elevator within a certain time specified in

said contract; the said Luther E. Mansfield hereby agreeing that all prosecutions of all claims shall be in his name individually."

It is manifest from the language of the instrument that the parties intended to transfer some claim then in existence, arising under the contract in question, and that such claim required prosecution by action in order to enable the assignee to enjoy the benefit of the assignment. The only doubt as to the meaning of the contract arises from the use of the words "award or awards" therein. Neither the contract nor the evidence shows that any awards were contemplated by the contract, or that any had been or could be made thereunder; and in the absence of explanation as to the application of such words, there does not appear any subject-matter for the assignment to operate upon. It is a familiar rule that parol proof of extrinsic circumstances may be given to apply a description to its subject-matter, and that if it appears that the description is in some parts erroneous those parts may be rejected, and what is left, if sufficient of itself, alone be regarded. *Fish v. Hubbard*, 21 Wend. 651; *Burr v. Broadway Ins. Co.*, 16 N. Y. 267; *Field v. Munson*, 47 N. Y. 221; *Gardner v. Heyer*, 2 Paige, 11.

Upon the trial the plaintiff gave in evidence a judgment roll in an action in the supreme court, wherein he was plaintiff and the said Gill was defendant, instituted to procure a reformation of the language of the said assignment, so as to make it conform to the real intentions of the parties when it was made, and also an assignment executed by Gill in conformity to such judgment, transferring to the plaintiff all causes of action growing out of the contract between Gill & Mansfield and the defendant. This judgment was rendered after the commencement of the present action, and after one trial thereof had been had. The defendant objected to the evidence. We think the evidence was competent. As we have seen, it was proper for the plaintiff to give parol evidence of the meaning of the language used in the assignment, and a judgment against Gill, the only party except the plaintiff who had an interest in the matter, determining that fact, was the highest evidence that could have been given upon the issue. The only interest that the defendant here had in that question was to be protected from any claim under the contract by other parties. This judgment bound the parties to it, and effectually protected the defendant from any claim which could be made by Gill.

We have been invited by the appellant to express our opinion upon the question of the damages recoverable in this action, but we do not think that question is before us in such a shape as to authorize an opinion thereon.

The judgments of the courts below should be reversed, and a new trial ordered, with costs to abide the event.

(All concur, except RAPALLO, J., absent.)

PRICER

v.

BOSTON AND LOWELL R. CORP.

(Advance Case, Massachusetts. April 16, 1886.)

A railroad company took certain land for depot and station purposes, damages for such taking being duly assessed and paid. The company then erected on the land taken a large building, three stories high, with a cellar. The upper stories contained a large number of chambers, and the ground-floor contained a room adapted and intended to be used as a waiting-room for passengers. Adjoining it was an office for the station master and a toilet-room. An entry led from the waiting-room into two large rooms, and there was also on the floor a carving-room and a kitchen. The company furnished the furniture for the waiting-room and office, and placed a furnace in the cellar, but did not furnish the rest of the rooms in the building. On one end of the land taken the company erected an engine-house, fitted to house three locomotives. Near the first-mentioned building the company erected a stable, with accommodation for horses and storage of carriages and hay, and near the stable a piggery. The station-master was paid a small salary; but, in return for his services, was given by the company the whole use, income, and improvement of those portions of the first-mentioned building not used for depot purposes, and the use for garden purposes of about one and one quarter acres of the two acres taken, and the use of the stable and piggery. The depot master furnished the chambers in the first-named building with beds and furniture, and placed in the kitchen in the building its necessary furniture, and took lodgers and boarders, of whom he had an average of about twenty, a large portion of whom were officers and instructors in the State prison, and their families; the prison being near the building. Regular meals were furnished, without reference to the times of arrival or departure of trains, and there were no special accommodations for transient travellers. The stable had two signs toward the highway, one "Hotel Stable," the other "Livery Stable;" and the depot master kept several horses for hire, and also pigs in the piggery, and, to a limited extent, cultivated and took crops from the land. For part of one year the engine-house was occupied by contractors, who were building water-works in the town, who had their material brought over the railroad and made up in the engine-house, and for the use of the latter paid the railroad company. The lower floor of the large building was used by the company as a waiting-room for passengers. *Held*, that the use made of the premises by the company was not inconsistent with the purposes for which they were taken, and that such an occupancy, if continued for twenty years, would not disseize the owner of the fee, in case the company, at the end of that time, abandoned the use for railroad purposes.

Where a railroad company takes land, under the statute, for railroad purposes, the only limit to the use which the corporation may make of the land is that it shall be a use authorized by its acts of incorporation. Within that limit, the manner in which the land shall be used and occupied is in the discretion of the corporation.

The authority given in the statute to a railroad company contemplates a more exclusive occupation where the land is taken for station purposes than

where the land is taken for laying out the road. The former taking requires a possession as exclusive and absolute as belongs to a seizin in fee.

If a corporation exceeds its franchise in the manner of its occupancy of land taken for station purposes, if the land is still used for such purposes in part, such occupancy does not thereby disseize the owner of the fee.

No occupation of land taken for depot and station purposes which is not inconsistent with its use for such purposes can be evidence of a claim to the fee, and any occupation of it which is concurrent and consistent with, and does not exclude, its occupation for station purposes, must be presumed to be under that right.

This was a writ of entry. At the trial in the superior court before Pitman, J., the following facts appeared :

Demandant was the owner of the premises described in the writ, and of other large tracts of land in the neighborhood. She had her home place, consisting of a dwelling-house and barn, 40 by 25 feet, within a stone's throw of the demanded premises. The tenant succeeded to all the rights and duties of the Middlesex Central R. Co. On the first day of January, A.D. 1879, the Middlesex Central R. Co. filed a location of an extension of its railroad in the town of Concord, and took thereby about three acres of demandant's land. On October 31, A.D. 1879, the said Middlesex Central R. Co., under St. 1874, c. 372, §§ 58, 60, the county commissioners of Middlesex county having prescribed the limits thereof, took and filed a location upon about two acres more of demandant's land adjoining the foregoing, for depot and station purposes, which are the premises described in the writ. Damages for each of said takings were thereupon duly assessed and paid. The tenant thereafter built on the most westerly end of the two acres so taken for depot and station purposes a large building three stories high, with a cellar. This building was immediately opposite the main entrance of the State prison, and access to the two upper stories thereof was had through a large central door opening on the southerly side of the building towards the prison. These two stories contained seventeen chambers. The ground-floor contained a room at the westerly end opening on the southerly side onto the highway. This room was adapted for and intended to be used as a waiting-room for passengers. Adjoining it was an office for the station master, and a toilet-room for ladies. An entry led from the waiting-room into two large rooms, connected by folding doors, in the centre of the building, and to the east of these was another small room for a carving-room, and beyond this a kitchen. The tenant furnished the furniture for the waiting-room and office, fitted the waiting-room with a stove, and connected the rest of the building with a furnace in the cellar, but did not furnish the rest of the rooms in the building with any furniture, fixtures, or appliances. On the easternmost end of said two acres the tenant erected an engine-house, fitted to house three locomotive engines. Near the first-mentioned building the tenant erected upon said lot

a stable, with accommodations for five horses and for the storage of carriages and hay, and adjoining the stable a piggery.

There was not, at the time of the erection of said buildings, nor has there been since, any tavern or other place where passengers over said railroad could obtain meals, lodging, or other accommodations within some two miles of said building, which was at the terminus of the railroad. Since January 24, 1880, the tenant has occupied the waiting-room, the office, and toilet-room of the first-named building for depot and station purposes connected with its railroad. It has used the engine-house for the purpose of housing engines. The occupation of said two acres other than is above stated has been as follows: Since January 24, 1880, the tenant has employed a depot master, whose duty was to attend to the passenger, freight, and telegraph business of the railroad at that place, and who gave his services, which were worth from \$30 to \$33 per month, and \$200 in cash each year, and in return therefor was given by the tenant the whole use, income, and improvement of those portions of said first-named building not used for depot purposes as above stated, and the use, for garden purposes, of about one and a quarter acres of said two acres, and the use of said stable and piggery. The depot master furnished the seventeen chambers with beds and furniture, the two central rooms on the ground-floor with chairs and tables, and the kitchen with its furniture, and has had an average of twenty lodgers and boarders, more or less permanent, a large proportion of whom were officers and instructors in the State prison, and their families, and some of whom, from time to time, were employees of the railroad company. Regular meals were furnished daily, without reference to the times of arrival or departure of trains. There were no special appliances for transient travellers to obtain meals. The railroad company furnished the coal for the furnace. The stable had two signs towards the highways, one, "Hotel Stable;" the other, "Livery Stable." This stable was erected in the early summer of 1883. The depot master has kept there two horses to let for hire, and has baited such transient horses as from time to time came there, both for persons who visited the prison, and for those who took trains on the railroad. He kept nine pigs in the piggery, and, to a limited extent, has cultivated and taken crops from the land.

For four months in the summer of 1883 the engine-house was partially occupied by Farris & Halliday, contractors, to construct water-works for the town of Concord, who brought cement and sheet-iron tubes over the railroad as freighters, and worked up the cement and lined the tubes for water-pipes in said engine-house, for which use of the engine-house they paid the tenant \$75. At the trial the demandant offered the record of the conviction of Warren K. Snow, who was the depot master in 1882, of the illegal sale of intoxicating liquors upon the demanded premises. This evidence

was excluded, and the demandant excepted. The gross receipts for passenger and freight business at this station have averaged about \$175 per month since its occupation, and the passenger travel has been very small. After the demandant had offered the evidence heretofore recited as to the rents and profits received by the tenant from the use of the building first named, the tenant was permitted, against the demandant's objection and exception, to show that the said building cost \$6275, including the furnace; but, as the demandant's view was not adopted, that her damages in this action depended in any measure upon the rents and profits so described, there was no occasion, in the ultimate finding, to consider either the income from or the cost of said building.

This is substantially all the evidence in the case, and is reported at the request of the parties.

The court held that the tenants had only an easement in the land, and not a freehold estate, and their right of occupation was limited to such use of the premises as was warranted by their charter and the statutes, and was reasonably necessary to their exercise of the privilege and functions thereby conferred. The court made no special finding of specific facts of misuse; but, upon the whole case, found as a fact that the tenants had exceeded the lawful use of the demanded premises, and had asserted rights in and done acts upon the premises not justified by the authority given them as aforesaid. Therefore the presiding judge found that the plea is falsified, and that the demandant is entitled to a qualified judgment, subject to all rights of the tenant under their charters and locations; and ruled that the demandant is entitled to recover as rents and profits since January 24, 1880, the clear annual value of the land, without any buildings thereon, subject to the right of the tenant to its exclusive possession for railroad uses under its charter and locations, and assessed the rents and profits at \$103. The case is now reported by the agreement of the parties for the determination of the supreme judicial court as to the law involved.

W. H. Strout and *W. H. Coolidge* for tenant.

S. Hoar for demandant.

W. ALLEN, J.—The tenant has all the rights in the demanded premises which are given to a railroad corporation in land taken for depot and station purposes under St. 1874, c. 372 § 60, (Pub. St. c. 112, § 91), and the demandant has all the rights of the owner in fee for whom the land was so taken. The tenant has disclaimed all title except to an easement, and thus admitted of record all the title which the demandant has. So far as affects the title, it is immaterial whether judgment on this issue be for the demandant or for the tenant. If, however, the demandant can show that she was in fact disseized by the ten-

RIGHTS
TENANT
OF
DEMANDANT.

ant, she will show that the writ was rightfully brought, and will be entitled to costs of the suit, and may recover damages for mesne profits. It was decided in *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, 104 Mass. 1, that a railroad corporation might disseize the owner of the land over which its road was located by doing acts upon the premises not justified by its rights under its location, and which implied a claim of title, or required a title for their justification. The court say:

"When there is a right which authorizes the party defendant, for certain purposes, to disturb the soil or occupy the land, acts done in apparent conformity therewith, or even of an equivocal nature, will be referred to that special right, although, in the absence of such authority, the demandant would be entitled to regard the acts as an assertion of title and a disseizin of himself. In respect to lands taken by railroad corporations, although the discretion of the directors is unlimited as to the mode and extent of the use or occupation for the purpose for which the corporation was erected, yet it is definitely limited by those purposes. Any use of the land confessedly for other purposes, or not apparently for purposes permitted by its charter, is not protected by its authority."

We have only to adopt the rule of that case to the facts of the case at bar, and inquire whether the acts of the tenant were for purposes other than those for which it might lawfully occupy the land, and amounted to an assertion of title and an assumption of seizin in fee. St. 1874, c. 372, § 52 (Pub. St. c. 192, § 88), provided that a railroad corporation might lay out its road, not exceeding five rods in width. This gave to the corporation the absolute right to impose the easement of a right of way upon the land, but no authority to take the land itself. It is the right acquired by the laying out of the road under this provision of which it was said that it, "though technically an easement, yet requires for its enjoyment a use of the land permanent in its nature and practically exclusive." *Hazen v. Boston & M. R.*, 2 Gray, 574. The only limit to the use which the corporation may make of the land is that it shall be a use authorized by its act of incorporation. Within that limit the manner in which the land shall be used and occupied is in the discretion of the corporation. *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, *ubi supra*, and cases there cited. But the rights of the tenant in the demanded premises are not merely those acquired by the location of its road.

The section of the statute already referred to further authorizes the corporation, for the purpose of cuttings, embankments, and procuring stone and gravel, and for depot and station purposes, to "purchase or otherwise take," in the manner afterwards provided, as much more land as may be necessary for those purposes. Sub-

WHETHER ACTS
AMOUNT TO DIS-
SEIZIN.

sequent sections provide the manner in which such land may be taken. If the corporation is not able to agree with the owner, it may apply to the county commissioners, who shall prescribe the limits within which it may be taken, and the corporation shall file a location of the land taken. The statute indicates a more exclusive occupation of the land taken for materials or for station purposes than of the five rods in width on which the road is laid out. The latter gives directly only the right of way over the land. The right to exclude the owner from the land, to use the land for constructing and maintaining the road-bed, to erect upon it shops and buildings used in the business of a common carrier of persons and goods, are incidental to the right of way. The former, the taking of land for materials and for station purposes, directly contemplates the exclusive occupation and appropriation of the land, as shown by the manner of the taking and the nature of the use for which it is taken. It is to be purchased or otherwise taken. If not purchased, it cannot be taken until the county commissioners have prescribed its limits, and, when taken, it is taxable to the corporation; and the uses for which it is expressly taken require a possession as exclusive, and practically as absolute, as belongs to a seizure in fee. It may be assumed that the fee in land thus taken remains in the owner from whom it was taken, and that the corporation, by ceasing to use it for the purposes for which it was taken, and appropriating it to uses not included in its franchise, may become seized of the fee, and thus disseize the owner, as decided in regard to land over which a railroad was laid out in *Proprietors of Locks & Canals v. Nashua & L. R. Co.*, *ubi supra*. In that case the court says:

"The occupation of the buildings upon the demanded premises for the general purposes of trade and mechanical or manufacturing business, by lessees having no other connection with the operation or interests of the corporation than as its tenants paying rent, and the conversion of those buildings by the corporation, from their original design, into private stores or shops for the purpose of so changing their use, placed them beyond the scope of the corporate purposes and functions, and involved an assumption of ownership, and made the corporation tenant of the freehold by disseizin."

No occupation of land taken for depot and station purposes which is not inconsistent with its use for such purposes can be evidence of a claim to the fee, and any occupation of it which is concurrent and consistent with, and does not exclude, its occupation for station purposes, must be presumed to be under that right. The manner in which it shall be used for the designated purposes is in the discretion of the corporation, and is no concern of the land-owner. Even if the corporation exceeds its franchise in the manner of such occupancy, it does not thereby disseize the owner of the fee. If a railroad corporation fits its station-house with conveniences for fur-

nishing lodging and food necessary for the comfort of its passengers, it does not claim the fee of the land by allowing others than passengers to use them. It is not a claim of the fee in the land that it does not distinguish between the public and its passengers in the use of the refreshment table, news-stand, or telegraph office kept there. The building is none the less a station-house, and the fitting it for use and providing conveniences for passengers and the public alike is an incident of its use for the business of the corporation, and a mode of inviting passengers to its road; and, in doing it, the corporation asserts no right except to maintain a station-house, and what it deems incidental to that. It may exceed its corporate rights in the use of its station-house; but it does not thereby claim the fee in the land on which it stands. When the tenant came into possession of the franchise, the road was located, and the station grounds of two acres taken at the terminus of the road. What the prospective business of the road was, does not appear; but it does appear that its present dependence for business was upon the State prison. Whatever passenger travel there was to be for a time must be drawn by that, and the amount of it might depend largely upon whether it was attracted or repelled by the conveniences furnished to travellers by the corporation, for there were none furnished except by it; and the prospective business of the road, and the increase of population and business about it, might depend upon the conveniences furnished at the station to travellers and sojourners. The whole demanded premises were occupied as the station; and furnishing food, lodging, horse keeping, and horse hire, and allowing buildings upon it to be used for a boarding-house and a stable, and some of the land to be cultivated—all for the convenience of its passengers and others, in order to increase the business of the road,—were incident to its business as a passenger carrier, and consistent with its occupation for the purposes for which it was taken, and with a claim to occupy for those purposes.

Another way of stating the question is, would the tenant acquire the fee by twenty years' continued occupation? It is actually using the premises as its station grounds, and has its tracks and its engine and passenger house upon them. If, after twenty years of such occupation as has been shown, it should wholly abandon the use for railroad purposes, and then should claim the fee by disseizin, the obvious answer would be that it occupied them under the taking for depot and station purposes, and not as owner in fee. It seems that the demandant has not the right of possession of the premises. The tenant is in possession, in the exercise of a public franchise, with which the demandant has no right to interfere, and it is difficult to see how there can be a disseizin of the demandant while such occupation continues. In *Proprietors of Locks & Canals v. Nashua & L. R.*

ACQUIRING FEE
BY TWENTY
YEARS' OCCUPA-
TION.

Co., *ubi supra*, there had been an abandonment of the use of the land under the franchise,—not a technical abandonment, because, as was said, a public franchise cannot be abandoned,—but an entire disuse of it, and an inconsistent use which would have been an abandonment of private right, and which gave to the demandant a right of action in trespass, and therefore a right of at least temporary possession until the land should be used for the purposes of the franchise. In this case there has been no non-user, but a continued occupation of the land for the purposes of the franchise which is inconsistent with a claim of the fee. The same occupation cannot be both under the franchise and in fee. If it is not under the franchise, but by disseizin of the fee, it must give to the demandant the right of possession. Being in the rightful possession, and the actual use of the land for the purposes for which it was taken, and having the absolute right to determine the manner of occupation for such purposes, its occupation must be presumed to be in the exercise of that right. It is not until it substitutes another use for that given by its franchise, so that its possession of the land is wrongful, that its occupation can be referred to the claim of the freehold.

Judgment for the tenant.

LOUISVILLE, NEW ALBANY AND CHICAGO R. Co.

v.

SUMNER.

(*Advance Case, Indiana. March 2, 1886.*)

Where a right of way was conveyed by deed to a railroad company, in consideration of the receipt of a sum of money, and the making of a covenant on the part of the company written in the deed "to make a stock pass under said road, and a farm crossing over it, and to fence said strip, and further to locate and maintain a depot on the line between the above tracts," and the company failed to perform any of the stipulations, but promised from time to time to make the fence, stock pass, and crossing, it is liable in an action for the value of animals killed by the cars, the animals having gone upon the track by reason of the failure to fence; and it is also liable for the value of pasturage lost to the grantor by such failure and for injury sustained by trespassing animals, as well as for the cost of erecting such fence, and for the loss of the increased value which would have resulted to the property adjoining if the depot had been located and maintained.

Agreements are against public policy and void where they secure the location of a depot at a particular place, but contain a prohibition against the

location of any other depot within certain prescribed limits; or where an officer or person of supposed influence with a railway company undertakes, for a consideration moving to him, to secure the location of a depot or station at a designated point. But where an agreement has been made between an individual and a railway corporation for the location of a station or depot at a particular place, in consideration of a donation of money or property to the corporation, without any restriction or prohibition against any other location, the violation of such agreement will be compensated for in damages.

APPEAL from the Hamilton County Circuit Court. **Affirmed.**

The case is stated in the opinion.

Kane & Davis for appellant.

R. R. Stephenson for appellee.

MITCHELL, J.—On the 14th day of November, 1881, Green C. **FACTS.** Sumner and wife conveyed a right of way sixty-six feet in width, over two adjoining tracts of land, to the Louisville, New Albany & Chicago R. Co.

The deed recites that the conveyance was made in consideration of the payment of \$200, and in further consideration of a covenant on the part of the railway company written in the deed, "To make a stock pass under said road, and a farm crossing over it, and to fence said strip, and further to locate and maintain a depot at the line between the above tracts."

On the 17th day of January, 1885, Sumner brought this suit to recover damages for alleged breaches of the covenants above recited. The breaches assigned are: 1, that the railway company wholly failed and refused to establish and maintain a depot at the place designated; 2, that it failed and refused to erect and maintain fences, whereby the plaintiff had sustained damages in various ways specified.

At the trial the court permitted the plaintiff to prove as an element of damage that two of his hogs had been killed by the cars, the animals having gone upon the track by reason of the failure of the defendant to fence its right of way over plaintiff's land.

Evidence was admitted to show that animals had gone upon and trespassed on the plaintiff's land, and that plaintiff, by reason of the failure of the company to build the fence, had been deprived of the pasturage upon lands adjacent to the right of way.

Evidence was also admitted to show that the plaintiff's farm was worth less than it otherwise would have been because of the failure to erect and maintain a depot at the point designated in the deed.

A general verdict for the plaintiff was returned, assessing damages at \$995. By answers to special interrogatories the jury returned the following items of damage:

1. The cost of erecting the fence.....	\$250 00
2. Damages for failure to erect fence, embracing the following items: Hogs killed.....	\$25 00
Loss of pasture, three years, \$50 per year...	150 00
Trespassing animals.....	30 00
Total.....	205 00
3. Failure to erect and maintain depot.....	500 00
Total.....	\$955 00

The record presents in various ways questions as to the correctness of the rule of damages, as applied by the court, for the failure to erect fences according to the stipulation in the deed. It is also claimed that the covenant contained in the deed by which the defendant agreed to erect and maintain a depot is void, as being against public policy.

It is argued that the measure of damages for the failure to erect the fence was the amount it fairly cost to erect it, and that the court erred in permitting the jury to hear and consider evidence of the value of hogs killed by the defendant's cars; the value of the use of pasture lands which plaintiff was prevented from using, and of damage sustained by trespassing animals entering upon lands adjacent to the track. The argument is that upon the failure of the railway company to erect the fences within a reasonable time, it became the duty or the privilege of the plaintiff to erect them, and thus prevent the damages from being enhanced.

While it is true that the law imposes upon a party who is injured from another's breach of contract the duty of making reasonable exertions to render the injury as light as possible, it is equally beyond question that where he whose duty it is primarily to do work necessary to fulfil a contract, and to prevent damage which may result from a failure has equal knowledge of the consequences of non-compliance and opportunity to fulfil the obligation, he alone may be depended upon to perform the duty, and it will not avail him to say the injured party might have performed the duty for him, and thus lessened the damage. *Chicago & R. I. R. Co. v. Ward*, 16 Ill. 522; *Suth. Dam.* 151.

The plaintiff had the right to depend on the defendant to perform its contract until it repudiated it, or until it became apparent that the railway company did not intend to execute it within a reasonable time. Upon the occurrence of either event the plaintiff had the right to erect the fence himself, and call upon the defendant to refund the actual cost and to reimburse him for such special damage as directly resulted from its failure to perform the contract. *Myers v. Burns*, 35 N. Y. 269; *Hexter v. Knox*, 63 N. Y. 561.

The defendant, through its agent, having given assurance when requested to perform its contract that it would proceed to do so, it cannot be said that the plaintiff was not justified in relying upon

DUTY OF PLAINTIFF TO HAVE PREVENTED ENHANCEMENT OF DAMAGES.

the assurances so given and, in reliance thereon, postponing the erection of the fences himself.

It must be supposed that the defendant knew, when it made the contract and in pursuance thereof exposed the plaintiff's farm to **DAMAGES** injury by throwing the fields open to the public, and rendering it hazardous for him to allow his own animals to pasture where they would be exposed to destruction by the defendant's trains, that special damage would result. Such damages must therefore have been within the reasonable contemplation of the parties when the contract was made. We think they were properly allowed.

Was the stipulation in the deed "to locate and maintain a depot," on the line between the several tracts over which the right of way was granted, void?

Agreements of the character under consideration so far as they have become the subject of judicial interpretation are of three classes.

There are those in which stipulations are contained providing for the location of stations or depots at particular places and prohibiting the location or erection of any others within certain prescribed limits. Concerning all such agreements as contain restrictive stipulations by which the railway company undertakes to prohibit itself from thereafter erecting other station houses or depots, at other places or within prescribed limits, they are uniformly, so far as we know, held to be void as against public policy.

Railroad corporations are regarded as public agencies, owing duties to the public generally. They are, therefore, not authorized to make any contract which may prevent them from discharging their duties efficiently to the public, and for that reason they cannot contract that the company will not locate a station or erect a depot at a place where the demands of business or concentration of population may at some time in the future require it. Such a contract is void as against public policy. *Williamson v. Railroad Co.*, 53 Iowa, 126; *St. L., J. & C. R. Co. v. Mathers*, 104 Ill. 257; *s. c.*, 9 Am. & Eng. R. R. Cas. 600; *Marsh v. F., P. & N. W. R. Co.*, 64 Ill. 414; *St. L., J. & C. R. Co. v. Mathers*, 71 Ill. 592; *St. Jo. & D. C. R. Co. v. Ryan*, 11 Kan. 602.

Another class of cases is those in which some officer or other person supposed to be influential with a railway company undertakes for a consideration moving to it, to secure the location of stations, depots, etc., at a particular place. A conspicuous case in this class is *Fuller v. Dame*, 18 Pick. 472.

All such contracts are void as against public policy. *Boston v. Wathen*, 60 Ill. 138; *Linder v. Carpenter*, 62 Ill. 309.

Still another class is that to which the case under consideration is allied. Such are the cases in which an agreement has been

AGREEMENT TO
LOCATE DEPOT
CONSIDERED—
AUTHORITIES.

made between an individual and a railway corporation, for the location of a station or depot at a particular place, in consideration of a donation of money or property to the corporation, without any restriction or prohibition against any other location.

No case has fallen under our notice in which this question was directly involved and which was not controlled by other considerations, which condemn such an agreement.

On the contrary it has been held that an agreement to pay a railway company a stipulated sum in consideration that it would locate its route at a particular place is valid and may be enforced. *C. V. R. Co. v. Baab*, 9 Watts, 458; *First Nat. Bank v. Hendrie*, 49 Iowa, 402.

So a conditional subscription of stock is valid. *N. A. & S. R. Co. v. McCormick*, 10 Ind. 499; *Jewett v. L. & U. M. R. Co.*, 10 Ind. 539.

A voluntary grant to a railroad on condition that it would locate its route and establish a depot at a certain place was sustained, as not being in contravention of public policy. *McClure v. M. R., F. S. & G. R. Co.*, 9 Kan. 373.

That railway corporations have power to acquire, either by purchase or by donation, lands for depot purposes is of course not questioned; and that donations or subscriptions in aid of railways by counties, cities, or townships may be subject to terms and conditions in respect of the location of machine-shops, depots, etc., is expressly recognized by, and provided for, in §§ 4045, 4058, R. S. 1881.

Such conditions have been held valid in cases of subscriptions made by townships. *Bittinger v. Bell*, 65 Ind. 445; *Brokaw v. Board*, 73 Ind. 543.

Public policy as declared by the legislature, and enforced by this court, permits counties, cities, and townships to make subscriptions or donations to railway corporations, subject to conditions in respect of the location of depots.

We can see no good reason why the courts should declare a different policy as between individuals and railway companies.

We should doubt whether in either case a restrictive condition which should undertake to bind or prohibit the company from providing other facilities which might be needed for the public service at other places might not invalidate an agreement; but as there is nothing of that character contained in the deed under consideration, we decide nothing beyond the question involved.

The case before us is in many respects analogous to *Waterson v. Railroad Co.*, 74 Pa. St. 208. In that case a land-owner, for a nominal consideration, released to a railroad company a right of way over his land and conveyed to it a lot on which to erect a depot.

For a failure to comply with its contract, it was there held that the measure of damages to which the land-owner was entitled was

the additional value which the advantages of a depot so located would have given the land.

The stipulation in the deed under consideration contains no restriction. It is general in its character, and could not possibly have been found a source of embarrassment to the railroad company in the future.

All that was required under the stipulation was that a depot commensurate with the necessities of the locality should have been erected and maintained. For the failure to do this, we think the appellant was liable in damages. We do not think the case of *State v. Johnson*, 52 Ind. 197, supports the appellant's contention here.

It is suggested that the proof failed to show that the deed was ever delivered to the railroad company. The record shows that the deed was read in evidence without objection, and the plaintiff testified that he and his wife executed it.

Prima facie this showed a delivery of the deed, as a delivery is included in the execution. It may be that the damages assessed are excessive, but as there was competent evidence upon which the jury may have based the amount assessed, we are unable to disturb the finding.

As we find no error in the record, the judgment is affirmed, with costs.

Failure to fence and to locate Depot.—The liability of a railway company for its failure to fulfil its covenant to fence a strip of land over which it received a right of way, make all necessary farm crossings, and establish a depot within one half mile of the land over which the right of way was conveyed, declared, in accordance with the decision of the case of *Louisville, N. A. & C. R. Co. v. Sumner*, *ante*. *Louisville, N. A. & C. R. Co.*, App't, v. *Moore*, 2 Western Repr. 666.

Application to State Railway Commissioners must precede Mandamus to compel Erection of Depot.—The act of the legislature creating the railway commission, which took effect June 6, 1885, gives such commission general supervision of all railroads operated by steam in the State, and requires them, among other things, upon a proper complaint being filed, to investigate the necessity for an addition or change of station-houses or stations. A party, therefore, who requires the change, addition, or erection of a station must secure the action of the commission before this court will grant a *mandamus* to compel its location. The case of *State v. Republican Valley R. Co.*, 17 Neb. 647, s.c., 22 Am. & Eng. R. R. Cas. 500, was instituted before the act creating the railroad commission took effect. *State ex rel Moore v. Chicago, M. & St. P. R. Co.*, 27 N. W. Repr. 484 (Nebraska, 1886).

Agreement to maintain Depot, Enforcement.—The present weight of authority is to the effect that a railway corporation can bind itself to maintain perpetually a permanent depot at a particular spot.

An action can be maintained for the value of certain land conveyed to a railway company, the consideration being a parol agreement between the grantor and the company that the latter's depot should be permanently located in the southern part of a certain city, the railroad having afterwards removed its depot from that location. *International & Great Northern R. Co. v. Dawson et al.*, 63 Texas Reports, 200.

BURNETT

v.

GREAT NORTH OF SCOTLAND R. Co.

(English Law Reports, 10 Appeal Cases, 147.)

By feu charter, dated 1863, between A., the proprietor of land through which a railway was authorized to run, and the railway company, it was provided that the company should be bound to erect on a piece of ground conveyed to them by A. at a nominal feu rent, "a station for passengers and goods travelling by the said" railway, "at which all passenger trains shall regularly stop," to be called Crathes Station.

The station was erected. Subsequently certain trains were run, namely: (1) Excursion trains at low fares to certain places on the line, but not to Crathes Station. They were advertised by special handbills, and were not included in the time-tables except in error. (2) Trains called the Queen's messenger trains, run by arrangement with the Home Office, who paid the railway company a subsidy. (3) Trains called the post-office trains, run by arrangement with the post-office, who also paid a subsidy. The Queen's messenger trains and the post-office trains only ran during Her Majesty's stay at Balmoral; but they were advertised in the railway company's time-table, and through passengers were allowed to travel by them. They stopped at Crathes by signal, but did not stop regularly for setting down or taking up passengers. There was no contract with the Home Office or post-office that they should not do so.

A. sought declarator that all trains, including the above, except only such as might be hired for an individual or individuals for his or their exclusive use, should regularly stop.

Held, reversing the decision of the court below, that the trains called the Queen's messenger trains and the post-office trains fell within the terms of the contract; but, agreeing with the decision of the court below, that the excursion trains in the circumstances materially differed from ordinary passenger trains and did not come within the obligation.

APPEAL from the second division of the court of sessions, Scotland.

The question raised was whether Sir Robert Burnett, Bart., the appellant, proprietor of the estates of Leys, Crathes, and others, Kincardine, and superior of the land on which Crathes station is built, was entitled under a feu charter dated 1863 to have certain trains run by the Great Northern R. of Scotland, the respondents, over their line between Aberdeen and Ballater, regularly stopped at Crathes station.

When the Deeside R. Co., which was afterwards amalgamated and merged in the respondents' company, was formed and authorized to run their line through the estate of Leys, Sir Alexander Burnett, the predecessor in title of the appellant, entered into an agreement with them. Under this agreement, dated the 24th of January, 1853, the Deeside R. Co. undertook, *inter alia*, to con-

struct a siding at Crathes, in the immediate vicinity of the present station, "for the accommodation of the proprietor and tenants of the estate of Leys; and the said company hereby undertake that any of the passenger trains shall be stopped at said siding, although not appointed by the company's time bills so to do, on a preconcerted signal, to be arranged by the company with the proprietor of the said estate, being shown, so as to take up or set down any passengers proceeding from or to Crathes at said siding."

By feu charter dated the 27th of March, 1863, Sir James Horn Burnett, Bart., the successor and heir-at-law of Sir Alexander Burnett, on the narrative that the Deeside R. Co. had agreed, on his granting the deed, "to erect and build upon the ground hereby disposed, a station" of the railway "for passengers and goods, containing accommodation after-mentioned (which station will be of advantage to me and my tenants in the estates of Leys, Crathes, and others, as well as to the public at large) and to pay the feu duty and perform the other prestations hereinafter mentioned," disposed to and in favor of the Deeside R. Co. certain parcels of land. The deed then continued: "Declaring hereby that the several pieces of ground above described are disposed to the said railway company, but without prejudice to the deed of agreement between the deceased Sir Alexander Burnett of Leys, Baronet, my brother, and the Deeside R. Co., dated the 24th day of January and 21st day of February, 1853, for the purposes and subject to the conditions, restrictions, and clauses herein contained, which are hereby declared to be real liens and burdens affecting the said pieces of ground, namely, the said railway company shall be bound, within twelve months from the date of these presents, to erect, at their own expense, on the said piece of ground first above mentioned, on the west side of the bridge over the road leading to the said bridge across the Dee in course of erection at Durris, a station for passengers and goods travelling by the said Deeside Railway, at which all passenger trains shall regularly stop, to be called the 'Crathes' Station, containing a suitable waiting-room, covered passenger-shed, platform, and all proper accommodation for first-class and other passengers, and to maintain such station in all time coming, it being hereby provided and declared that the said railway company shall be bound to have a signal-post erected at the said station, on which a signal visible from Crathes Castle shall be displayed whenever any passenger or parcel for Crathes shall arrive at the station. It being hereby expressly provided and declared that, in the event of the said railway company not erecting said station within the time above mentioned, and making the accesses thereto shown on the said plan, or at any time hereafter discontinuing the use thereof as a regular goods and passenger station of the said railway, then, and in that case, these presents and the rights to follow hereon shall *ipso facto* become null and

void, without declarator, and the said piece of ground, and all buildings and works constructed thereon, shall revert and belong to me and my aforesaid, free and disincumbered of all burdens whatsoever, alike as if these presents had never been granted, and this without prejudice to our legal rights and remedies against the said railway company for obtaining implement of the prestations incumbent on them, as above expressed. To be holden, the said pieces of ground and others, of and under me and my heirs and successors in feu-farm, fee, and heritage for ever for payment to us by the said railway company and their foresaids of the sum of five shillings sterling yearly in name of feu-duty, term of Martinmas in each year, beginning the first payment thereof at the term of Martinmas, 1863, for the year then ending, and so forth yearly, in all time coming ;" with a duplicate every twenty-fifth year.

The parcels of land disposed by Sir James Horn Burnett amount to over two acres, and were alleged to be of the annual value of about £10.

The Deeside R. Co. erected the station stipulated for. It is situate between Aberdeen and Ballater, about fourteen miles from Aberdeen and three from Banchory. In 1877, and again in 1882, some correspondence took place between the respondents and the appellant as to certain trains not stopping at Crathes, and matters not having been satisfactorily arranged in 1882, Sir R. Burnett in 1883, with the object of obtaining a final determination of the matter, raised this action, concluding for declarator that it ought to be declared (but without prejudice to the deed of agreement between the now deceased Sir Alexander Burnett and the Deeside R. Co., dated 1853) that the defenders are bound regularly to stop at the station called Crathes for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station and carrying passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and particularly so long as they ran them, the following :

" (1) The train in use to be run during the summer season, leaving, or advertised to leave, Aberdeen for Banchory, Aboyne, and Ballater at or about one o'clock p.m. on Saturdays ; (2) the train in use to be run during the summer season, leaving, or advertised to leave, Ballater for Aboyne, Banchory, and Aberdeen at or about eight o'clock p.m. on Saturdays ; (3) the train in use to be run during Her Majesty's stay at Balmoral, leaving, or advertised to leave, Aberdeen for Banchory, Aboyne, and Ballater at or about half-past three o'clock a.m. on every day of the week except Monday, but including Sunday ; (4) the train in use to be run during Her Majesty's stay foresaid, leaving, or advertised to leave, Aberdeen for Banchory, Aboyne, and Ballater, at or about one o'clock p.m. on Sundays ; (5) the train in use to be run during Her

Majesty's stay foresaid, leaving, or advertised to leave, Ballater for Aberdeen and intermediate stations at or about five minutes past three o'clock p.m. on week days; and (6) the train in use to be run during Her Majesty's stay foresaid, leaving, or advertised to leave, Ballater for Banchory and Aberdeen at or about forty-five minutes past ten o'clock a.m. on Sundays."

A proof was allowed, and it appeared from the evidence of Mr. Moffat, general manager of the respondents' line, that at the time when the charter in question was granted the railway extended from Aberdeen to Aboyne, a distance of thirty-two and a half miles, and that it was subsequently extended to Ballater, eleven miles further. In 1863 there were five trains running each way stopping at Crathes, and there were now eight trains each way stopping at that station. His further evidence was substantially as follows:

The excursion trains mentioned in the first and second conclusions of the summons were only run on Saturdays. They ran from Aberdeen to Ballater, stopping at Banchory and Aboyne. The excursion usually leaves Aberdeen about 1 p.m. and Ballater at 8 p.m. on the return journey; the train goes out, waits and comes back with the excursionists. The object of the train was chiefly to accommodate the working classes. If sufficient people did not come forward, the train would not run. Every person who travels by these excursion trains must hold a special return ticket, which are issued at a lower rate than the ordinary fare. On the journey to Ballater excursionists are set down at Banchory and Aboyne, but no passengers are taken up at these stations in order to go westward. On the return journey the excursionists are picked up at Aboyne and Banchory, but no passengers are set down coming from the west. None of the excursionists are allowed to take luggage. These trains are advertised by special handbills, they do not appear in the time-table. In June and September, 1882, they were entered in the time-table by mistake. The object of the train was to get the people to the place to which the train is advertised to go as quickly as possible. These trains generally run in train loads, that is with the carriage full from the time of departure to the time of return.

The trains in third, fifth, and sixth conclusions of the summons are "Queen's messenger trains," and ran during the Queen's stay at Balmoral. The 3.30 a.m., from Aberdeen to Ballater, ran every day except Monday, including Sunday, in connection with the train arriving at 3.20 a.m. at Aberdeen from the south. The corresponding train left Ballater at 3.5 p.m., and ran in connection with the train from Aberdeen to London. This train ran every day but Sunday. There is next the 10.45 a.m. which ran on Sunday from Ballater in connection with the 12.30 south train from Aberdeen. In the time-tables the first-mentioned train was designated the

"Queen's special," and the two latter "Express Passengers 1st class." They had been run since 1871; and special subsidies were paid to the respondents by the Home Office for them. During the last ten years the railway company were paid £9278 in special subsidies, being an average of £927 per annum. The members of the Queen's household, other than couriers, could travel by these trains, on paying the ordinary fare. At present travellers coming off the south trains only are allowed to travel by the 3.30 A.M. train. But, as a matter of fact, local passengers from Aberdeen had been allowed to travel by this train. It will stop at any station on the line upon notice to the guard; the train has to stop at Banchory for water, but there are no booking offices open for issue of tickets. At Aberdeen there was a watchman, who was authorized to issue tickets to passengers coming from the south, who were not booked through. First-class passengers are allowed to travel by the 3.5 P.M. up train from Ballater, and third-class tickets are issued to the servants of gentlemen who are travelling first class. The railway company considered they were bound to comply with any request made on the part of the Queen or Home Office as to the time or manner in which these trains shall run. They looked on them as under the control of the Home Office for special purposes of Her Majesty. They could not run those trains unless they got a subsidy.

The train in the fourth conclusion of the summons, namely, that leaving Aberdeen on Sundays at 1 P.M., is run by arrangement with the Post Office, also only during Her Majesty's stay at Balmoral. It was in order to accommodate Her Majesty's correspondence. The Post Office paid the respondents specially for that train. It had run since 1871, and was under the control of the Post Office. The agreement with the Post Office was for carrying the mails generally, and they do it for an annual payment of £9750. Under article 14 of the agreement with the Post Office the respondents were bound to run special trains as they may from time to time require. And it was under that section this train was run in compliance with a special requisition from the Post Office. And the Post Office can object to the train stopping. It was by the permission of the Post Office the respondents carried passengers to their stations in these trains. The respondents looked on them as being out of their control, except as regards the mere running of them. Passengers from Aberdeen may be booked by the one-o'clock train to Banchory, Aboyne, Ballater, and Crathes. This train never stopped regularly at Crathes, but the respondents booked passengers to Crathes when asked to do so.

There was some evidence of the line in time being pushed on and joined to the Highland Railway and thus becoming a through line. Having to stop at Crathes would interfere with running through trains.

The appellant, *inter alia*, averred that he was in course of fencing ground at Crathes, and that with regard to that circumstance it was of the greatest importance that all passenger trains should regularly stop at Crathes station.

The respondents, *inter alia*, averred that since the date of the feu charter of 1863, circumstances had changed the character of the line. That now, owing to its extension to Ballater, a great development of traffic had taken place, which rendered necessary, in the interest of the public, express trains.

The pleas in law of the appellant were :

(1) On a sound construction of the feu charter and amalgamated act libelled the pursuer is entitled to decree of declarator as concluded for. (2) The pursuer, as superior of the subjects referred to, is entitled to enforce the obligation in question against the defenders as his vassals therein. (3) The defenders having already so far disregarded the obligation in question, and having threatened further to disregard it, the pursuer is entitled to decree of implement and interdict, with expenses as concluded for.

The respondents' pleas in law were, *inter alia* :

(1) On a sound construction of the said feu charter, the defenders sufficiently comply with the obligations therein imposed on them, by causing to be stopped at Crathes Station all ordinary passenger trains, such as were in use to be run at the date of the said feu charter, and were then in *intuitu* of the parties thereto. (2) The Queen's messenger trains referred to in the summons being express trains run under special arrangement with and paid for by Her Majesty, the pursuer is not entitled to insist that the said trains shall be stopped at Crathes Station. (3) The excursion trains mentioned in the summons not being part of the ordinary passenger service of trains, but express trains run for traffic between special places and on special occasions, the pursuer is not entitled to have the same stopped at Crathes Station. (4) In view of the changed and changing circumstances of the Deeside line, the pursuer is not entitled to decree as concluded for, etc.

On the 3d of July, 1883, the Lord Ordinary pronounced an interlocutor by which he assoilzied the defenders from the conclusions of the summons and found the pursuer liable in expenses.

The appellant presented a reclaiming note, and on the 20th of December, 1883, the Second Division (Lord Rutherford Clark doubting) adhered.

On the 20th of March, 1884, their lordships pronounced an interlocutor ordaining the appellant to pay the respondents 187l. 16s. 4d., as the expenses of the action.

On appeal,

Sir F. Herschell, S.G., and the Solicitor-General for Scotland (Asher, Q.C.) (with them R. B. Haldane) for appellant.

The Lord Advocate (*Balfour*, Q.C.) and *J. P. B. Robertson* for the respondents.

EARL OF SELBORNE, L. C.—The only difficulty with regard to the two classes of trains, which have been called Queen's messenger trains and Post-office trains, that I have felt in this case since it was opened, has arisen from the profound respect which I entertain for those learned judges in the Court of Session who saw their way to a conclusion of which, I must frankly confess, I do not clearly understand the grounds.

The contract with which we have to deal is in general terms. Two acres of land were feued off at a nominal or almost nominal quit-rent, very much less than the value of the land, upon the terms of this contract, and one of those terms was that on that land a station, with all proper accommodation for passengers, should be erected and maintained, and that (because I do not think that what has been called the parenthetical form in which the words occur make the slightest difference) all passenger trains of the company should regularly stop there. Obviously it would be convenient and beneficial to the owner of the adjoining property, Sir James Burnett, the person who granted the feu, that there should be the greatest possible facility of travelling from that station by the company's trains. And if the company entered into this contract, why should a court of law not regard the land-owner who stipulated for such a provision, which the company were quite able to accept or reject according to their view of their own interest? Why should that contract be regarded with more disfavor by a court of law than any other between parties capable of contracting together which they make when bargaining for their respective interests? There was no compulsion upon either of them; it was perfectly voluntary; there was good consideration given. And if a court of law is not to regard the contract with disfavor, why should it so regard the claim of the person with whom the contract has been made to have it fulfilled except so far as he may be disposed voluntarily to dispense on any occasion with its fulfilment? I own I have a difficulty in following some observations in the judgments below, which may or may not have influenced the conclusions of the learned judges, but from which I am bound to express my own dissent.

Then the case resolves itself simply into a question of the construction of this contract with reference to a given state of facts. Are or are not these trains which are called Queen's messenger and Post-office trains, passenger trains within the reasonable meaning of these words? The contract is universal; it says, "all passenger trains." If they are, in a sense consistent with the intention of the contract, as that intention is

CONTRACT AS TO
STOPPAGE OF
TRAINS—HOW
REGARDED.

CONSTRUCTION
OF CONTRACT.

to be gathered from its terms with due regard to extrinsic facts, passenger trains, it is quite clear that the company have engaged to stop them unless the holder of this property, the person entitled to the benefit of the agreement, dispenses with it. Now it seems to me that these trains have every possible characteristic of passenger trains, and no characteristic of any other sort of trains. They are advertised in the company's time-tables, and with regard to some of them the form of the advertisement is this: they are not only put down to go at certain times, and stop at certain stations (in one instance I observe that this very station is among them), but the classes of passengers to be carried by them are mentioned, first or third, as the case may be. And in the only case in which there is no entry in the proper column of the time-table of the classes of passengers, there is this note: "Stop where required to set down passengers off the south train," showing plainly that it is a passenger train, and that passengers are invited and expected to come by it; at all events those arriving from the south. And the limited form of expression, with regard to "passengers off the south train," is explained by the fact that it would start from Aberdeen in the middle of the night.

Therefore, in truth, these time-tables are the ordinary notice and invitation to all the world that there are such trains, and that passengers may go by them upon the usual and ordinary terms, for there is not the least qualification of the right of a passenger travelling by any one of these trains to be received and put down on the same terms, and with the same advantages, such as carrying luggage, and so forth, in all respects as ordinary passengers are entitled to. In point of fact, the company do carry passengers in that way, and, excepting so far as there is mention of "Queen's Special" at the head of two of these trains in the time-table, there is nothing to inform any single passenger of anything distinguishing these from other trains; and the heading "Queen's Special" informs them of nothing more than that this train which is to take passengers also answers some purpose under some special arrangement in which Her Majesty has an interest. But there is no inconsistency whatever between a special arrangement in which the Queen has an interest, or a special arrangement for carrying mails for the Post Office, and the fulfilment of that special arrangement by means of ordinary passenger trains, unless there were something in the terms of the special arrangement to exclude that mode of fulfilling it. There are no such terms in the arrangements here, either as to the Queen's messengers or as to the Post Office bags; and, in point of fact, the terms are fulfilled by these trains which are, to all practical intents and purposes whatsoever, passenger trains. They are passenger trains entirely under the control of the company—they are passenger trains in which, by the existing contracts, neither the Post Office nor any other au-

thority can forbid the company from carrying passengers. And to say that a train is not a passenger train, which in all other respects is so, because the company may have been led to agree to do something which it can do and does by means of that train, and may have agreed specially to start that train at particular hours, and to keep time in arrival as well as in departure according to a particular table, to say that that makes it less a passenger train is really extravagant; for in every case, so far as the public are concerned, some time has to be fixed. The company may fix their own time ordinarily, and if they agree for a consideration with anybody else to start a train at a particular hour, and that it shall arrive at certain places at particular hours, yet if they use it as a passenger train, it cannot be less so because the time is fixed by means of some collateral agreement. To me, therefore, it appears that as to these trains there is no intelligible ground for refusing to the appellant the benefit of the contract.

With regard to the excursion trains I am disposed to think that there are some material differences—I shall state the way in which they strike me, but I shall do it with less fulness, because I do not understand any serious controversy to be raised by the learned solicitor-general as to those excursion trains when they are under special advertisements, and are not advertised as running regularly in the ordinary time-tables.

EXCURSION
TRAINS—DUTY
TO STOP.

My view is, that there are reasonable grounds for distinguishing these special excursion trains specially advertised from passenger trains in the common popular sense, and in the sense in which I think those words should be understood in this contract. A passenger train *prima facie*, I think, is a train advertised to take passengers generally, people travelling from place to place, upon the terms and in the manner ordinarily applicable to such passengers. As an illustration, I may refer to the subject of luggage. In the special act of Parliament of this particular company, as we were informed, there is a provision that a certain quantity of luggage may be carried by every passenger. I may take another illustration from the practice of issuing season tickets (composition tickets as I see they are called on this record) for travellers by passenger trains. Now it is quite certain that the right to carry luggage, applicable to passengers generally, would not be applicable to persons who as a special favor were taken in a luggage or goods train; and we find upon the evidence, with regard to these composition tickets, that they do not give a pass for these special excursion trains, and no luggage is allowed to be taken by them; besides which, people are not carried upon the ordinary terms, either as to payment or otherwise, because every man who goes by such an excursion train must take a return ticket to come back to the starting point, so that he is not a traveller in the ordinary sense of the word, and he cannot claim to get out anywhere except at the place

to which he has a pass according to that contract. I am far from saying that arguments of some weight might not be used for the purpose of bringing in even such excursionists as passengers; but upon that point I cannot help observing that it is conceded that there may be exceptions to the words "passenger trains," in the case of persons who do pass by and are conveyed on the railway when they have specially hired a train. It was not disputed that if a large number of persons combined together specially to hire a train they would be in the same situation. Now these excursionists do not exactly do that; but I think, taking the whole matter into account together, that it is safe to say that the parties to this contract had in view, by the term "passenger trains," something different from this class of excursion trains, although they carry passengers.

My Lords, I am not at all disposed to use words in your Lordships' order which would let in unnecessary controversy as to whether or no the general right of the appellant is evaded by the use of particular words, when in substance there is no sufficient ground for a distinction or exception. The learned solicitor-general is not unwilling, as I understand, if the House should think that excursion trains of this kind should be excepted, that they should be excepted by adding these words at the top of page 4 (printed case, after the words "exclusive use," "and except special excursion trains not advertised as running regularly in the ordinary time-tables of the company;" and I think it much safer to adopt those words than to use the words "special excursion trains" in a more general form, which might let in questions as to what are such trains. I think that when they are not advertised as running regularly in the ordinary time-tables of the company, they are then broadly distinguished from those trains by which the company undertake to carry passengers in the ordinary manner. I cannot help agreeing with what one of your Lordships intimated in the course of the argument, that it is very undesirable to refer in the declarator to particular trains, some of which have been and others may be discontinued, or the times of which may be altered, which would make a reference to them useless; and your Lordships' view of the law applicable to the facts having been sufficiently expressed in the opinions which you may deliver, it will be enough to pronounce a declarator in these words: [His Lordship read the words of the order, p. 170, and continued:] I propose therefore to your Lordships to reverse the interlocutor appealed from, and to make that declaration, and with that declaration to remit the case to the court below. The appellant of course will have the costs of the action and of the appeal.

LORD WATSON.—The only doubts which I have entertained in this case have arisen from the view which was taken, first by the

Lord Ordinary, and then by the majority of the Second Division of the Court of Session. I cannot help thinking that the conclusion at which their Lordships arrived was to some extent affected by the considerations with which they deal in their judgments—considerations which, in my opinion, ought not to influence the construction or the obligation which we have to interpret. The Lord Ordinary enters at some length upon a consideration of the question whether, apart from the trains in dispute, there is sufficient train service for the traffic of Crathes and its neighborhood. One of the learned judges of the majority in the Inner House expresses doubt as to the validity of the obligation, and expresses himself in no doubtful terms as to the character of the obligation; and, entertaining these views, it is not matter of wonder that he should have arrived at a conclusion favorable to the respondents. I can only say that I see no reason to doubt that this condition has been validly imposed upon the feu, and will run with his estate so long as the superior has a legitimate interest to enforce it. And I see as little reason to doubt that it must be dealt with as a fair and equitable arrangement made by parties *vis à vis* in the year 1863, and that it is not open to any imputation of being an unfair or one-sided contract.

CONDITION HELD
VALID.

Then as to the construction of the words of the obligation, I agree with the Lord Chancellor. The Queen's messenger trains and the Post-office trains, as they have been termed, are simply composite trains, partly for the service of Her Majesty, or of the Post Office, and partly for the service of the travelling public; but the fact that they do accommodate the public, carrying them as passengers from station to station, is quite enough to stamp them with the character of passenger trains within the meaning of this obligation. And in considering whether they are passenger trains or no, it appears to me to be quite immaterial whether the service of the Post Office was added to a train already running for the accommodation of the public, or carriages for the conveyance of passengers were added to a train started for the purpose of carrying the mails. They are serving the purpose of passenger trains, and so long as they possess that character, although they may have other uses and purposes, and although the motive for starting them may not have been the convenience of travellers, it appears to me that they are passenger trains within the meaning of the feu charter.

CONSTRUCTION
OF CONTRACT.

As to the excursion train, as run in the year 1882 and since, I have formed a different opinion. I should not have held the same opinion with reference to that train as it was advertised to the public in October, 1882. I am by no means of opinion that every train called an excursion train ceases to be a passenger train within the meaning of this obligation, but the circumstances which lead me to think that this is not a pas-

EXCURSION
TRAIN.
CON-
SIDERED.

senger train within the meaning of the charter are, briefly, these: In the first place, there is a special arrangement made with each passenger at Aberdeen, differing in its terms from the ordinary contracts made by the company with the travelling public. And, in the second place, the persons who are admitted to travel in that train are collected at Aberdeen, as I understand the facts of the case, and the accommodation provided is simply sufficient to convey them from that terminus to their several destinations up the Dee and back again on the same day, and is not calculated to afford any accommodation to the travelling public.

I concur in the judgment which has been proposed by the Lord Chancellor.

LORD BRAMWELL.—I am of the same opinion. It seems to me that the defence “before us is so *ex facie nimious* and unreasonable as to excite prejudice against it, and one has to be on one’s guard to see that the exact legal rights of the parties, however unreasonable, are satisfied.” In saying this I know I differ as much as possible from the very learned and able judge whose words I am quoting, and I know the risk I run in so doing. But I feel bound to express my opinion strongly, because I think he has done great injustice to the plaintiff. I cannot but think that the learned lord has been under the influence he deprecated. I am aware that I may be acted on by this feeling of injustice done.

Let us see what the case is. The pursuer, or his predecessor in FACTS. title whose rights he has, gave land to this company one may almost say for nothing (that is to say, upon a nominal rent-charge of, I think, five shillings a year), except the benefit of this obligation which the pursuer is now seeking to enforce. I cannot help thinking that if this question had arisen thirty years ago, when the directors who made the bargain with the pursuer’s predecessor and the manager then in existence would have had to decide it, it never would have been a question at all. They never would have made such a point as has been made to-day, because I am satisfied in my mind that they would have known that in fairness they ought not to be setting up such a case as the respondents are setting up now. But Mr. Moffat, I think, in one of his letters (to do him justice) states that he had not seen the feu charter until after he had made the contention which had resulted in these proceedings taking place, and I dare say that he and his directors have satisfied themselves in some way that it is a defence which they may properly make and a case which they may properly set up. As I believe it to be *bona fide* I will not call it scandalous, but I think it extravagant.

Now, having made these remarks, I will address myself to the particular question before us, although I protest that I have great difficulty in giving any other judgment than this, that a “passen-

ger train" is a passenger train. The words are not words of art—they want no explanation either by railway people or by experts of any sort or kind. The question is whether these are passenger trains. The answer is they are passenger trains, and to my mind they are passenger trains that carry passengers in the ordinary way upon the ordinary terms, except the excursion trains, as to which I will say a word or two presently.

WHETHER CERTAIN TRAINS ARE PASSENGER TRAINS.

It seems to me that the difficulty has arisen from a mistake—partly, I must say with great respect, as I think, from a prejudice. Possibly it may be said in return that I am laboring under a prejudice in the opposite direction, and I may be, though I think not. It seems to have arisen partly from that, and partly from a notion that things not specifically within the contemplation of the parties to an agreement ought not to be held to be within the effect of it, which to my mind is a very great mistake, a mistake illustrated by the case I mentioned in the course of the argument, the case of the telephones. They were held to be within an agreement which had been made at a time when telephones were not known—they were held to come within general words which the prudence of people had put in for the purpose of providing for something which might arise at a future time. That seems to be one origin of what I think the mistake. Another cause of it (I say it with sincere respect for the learned lord of session, Lord Young, who seems to rely upon the point so much) is the notion that because a passenger train running regularly comes into existence, if one may so say, under the special circumstances of a bargain either with the Home Office, or with the Post Office, therefore that train—I was going to say although a passenger train—brought into existence under those particular circumstances is not a passenger train within the agreement. I cannot see the reason of that. I can only say I do not agree. I do not see why it should be so.

Now, one word with respect to excursion trains. One knows perfectly well what is meant in practice by an excursion train. It is a train which like others goes from one place to another, it may or may not stop and pick up passengers on the road. I believe it commonly picks them up, but it is a train which goes from one place to another with a view to people getting to that other place on cheap terms and very frequently upon the condition that the railway company are not to be delayed or inconvenienced by people taking luggage with them. But why is that not a "passenger train"? Passengers go by it, and they go by it from one place to the other in order that they may get to the other place. It is not the less a passenger train because they pay a small fare; nor is it the less a passenger train because by agreement with the company they do not carry luggage with them. It seems to me really that the substance of the thing is that; as I said before, passenger train is not a term of art, it is a popular ex-

EXCURSION TRAINS.

pression, and these popularly speaking are passenger trains, and no reason has been given why the words should have any other than their natural meaning. As to the pound-of-flesh argument, the judgment is not that the appellant should have none, but about three quarters of his pound. His right is to all; whether as a reasonable man he should exact all is another matter.

LORD FITZGERALD.—The judgment of your Lordships' House is invited on the construction of a portion of the feu charter of 1863, in which the language used is very general. It is open to us, and I should say necessary for a just conclusion, to consider the relation of the parties to each other before the feu charter was executed, so as to ascertain what the parties had in view and intended, and to limit the general words if necessary to what is fit and just.

There was a prior deed of agreement of 1853, made with the pursuer's predecessor, which is still in force, and it is observable that the feu charter of 1863 is made expressly "without prejudice FACTS. to that deed of agreement." By that agreement the company (the defenders) undertake to make certain accommodation works, and *inter alia*, by clause 9, that "a siding shall be made at the level crossing marked number $\frac{46}{2}$ on said deposited plans, for the accommodation of the proprietor and tenants of the said estate of Leys; and the said company hereby undertake that any of the passenger trains shall be stopped at said siding, although not appointed by the company's time bills so to do, on a preconcerted signal, to be arranged by the company with the proprietor of said estate, being shown, so as to take up or set down any passengers proceeding from or to Crathes at said siding." If it was necessary now to interpret that provision, speaking for myself, I would probably say that it applied to each and every train coming within the ordinary description of a passenger train, and that the obligation on the company was to stop each of such trains at the siding on the preconcerted signal. In other words, the Crathes siding was a signal station, at which, when there were passengers to take up or set down, the company was bound on signal to stop each one of its passenger trains. The position of things was probably found to be inconvenient, and not free from danger, and it became desirable to provide a station with all its conveniences in place of an unprotected siding, and relieve all parties from the cumbrous necessity of signalling.

That being the state of things, we have now to look to the feu charter of 1863, the main object of which, as well as its consideration, was the obligation on the company "to erect and build upon the ground hereby disposed a station of the said railway for passengers and goods, containing the accommodation after mentioned (which station will be of advantage to me and my tenants in the estate of Leys, Crathes, and others, as well as to the public at

large)," and the stipulated obligation was that "the said railway company shall be bound within twelve months from the date of these presents to erect, at their own expense, on the said piece of ground first above mentioned, a station for passengers and goods travelling by the said Deeside Railway, at which all passenger trains shall regularly stop, to be called the Crathes Station, containing a suitable waiting-room, covered passenger-shed, platform, and all proper accommodation, for first-class and other passengers, and to maintain such station in all time coming; it being hereby provided and declared that the said railway company shall be bound to have a signal-post erected at the said station, on which a signal visible from Crathes Castle shall be displayed whenever any passenger or parcel for Crathes shall arrive at the station." There are other accommodation provisions, but they are all confined to the requirements of the station. Then comes the irritancy clause for forfeiture of the right for breach of the feudal contract, but it is unnecessary to advert to it as it has been disposed of in the course of the argument.

The pursuer contended below, as he has insisted here, that by the stipulation "at which all passenger trains shall regularly stop," there is created an absolute obligation on the company to stop at the Crathes Station each and every of all the passenger trains that pass along the line. The defenders on the other hand have always admitted that they are bound to cause all passenger trains running on their line for the ordinary service and traffic of the district to stop at Crathes.

I have been at some loss to understand the meaning or extent of this admission on the part of the defenders and rather turn back on the real question: What is a passenger train? It would seem to me that every train of the company WHAT IS A PASSENGER TRAIN. over which the company retains its general control and dominion, and by which the company professes or offers to carry for hire in ordinary course such travellers as may take advantage of it on payment of their fares, is within the meaning of the stipulation in controversy a passenger train. It may be a special, or it may be an express train; it may carry the mail, or a Queen's messenger, or even excursionists; but it does not follow that it is not also a passenger train.

I am, my Lords, of opinion that in the construction of the obligation in question "all passenger trains" is to be interpreted as meaning "each and every passenger train," and as embracing the trains in controversy, save the special excursion trains which are run subject to special and peculiar conditions, and are not intended for ordinary travellers. It may be that the obligation assumed by the company was not wise or prudent on their part, but that is not for our consideration. It was not illegal or unreasonable on the part of the pursuer to insist on the stipulation for the benefit

of himself and his tenants. We have but to interpret and give effect to the plain meaning of the language used. If inconvenience or injury may arise to the company from the enforcement of their contract, they have ample means within their reach to protect themselves.

That the said interlocutors complained of in the said appeal be and the same are hereby, reversed. And it is declared that the defenders (respondents) are bound regularly to stop at the station called "Crathes," on the line of railway belonging to the defenders (respondents), between Aberdeen and Ballater, for the purpose as well of taking up as of setting down passengers, all trains now and hereafter passing through the said station for the conveyance of passengers, except only such trains as may be hired by an individual or individuals for his or their exclusive use, and except special excursion trains not advertised as running regularly in the ordinary time-tables of the company. And with this declaration, it is ordered that the said cause be remitted to the Court of Session in Scotland to do therein as shall be just and consistent with this judgment. And it is further ordered that the respondents do pay or cause to be paid to the appellant the costs of the action in the Court of Session. And it is further ordered that the respondents do repay to the appellant the sum of £187 16s. 4d. paid by him to them on the 4th of April, 1884, in name of costs, and £1 2s. 4d. paid by him to them on the 9th of April, 1884, in name of dues of extract of the action in the Court of Session. And it is further ordered that the respondents do pay or cause to be paid to the appellant the costs incurred in respect of the said appeal to this House.

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NOTE.—The mode of citing the American and English Railroad Cases is as follows:

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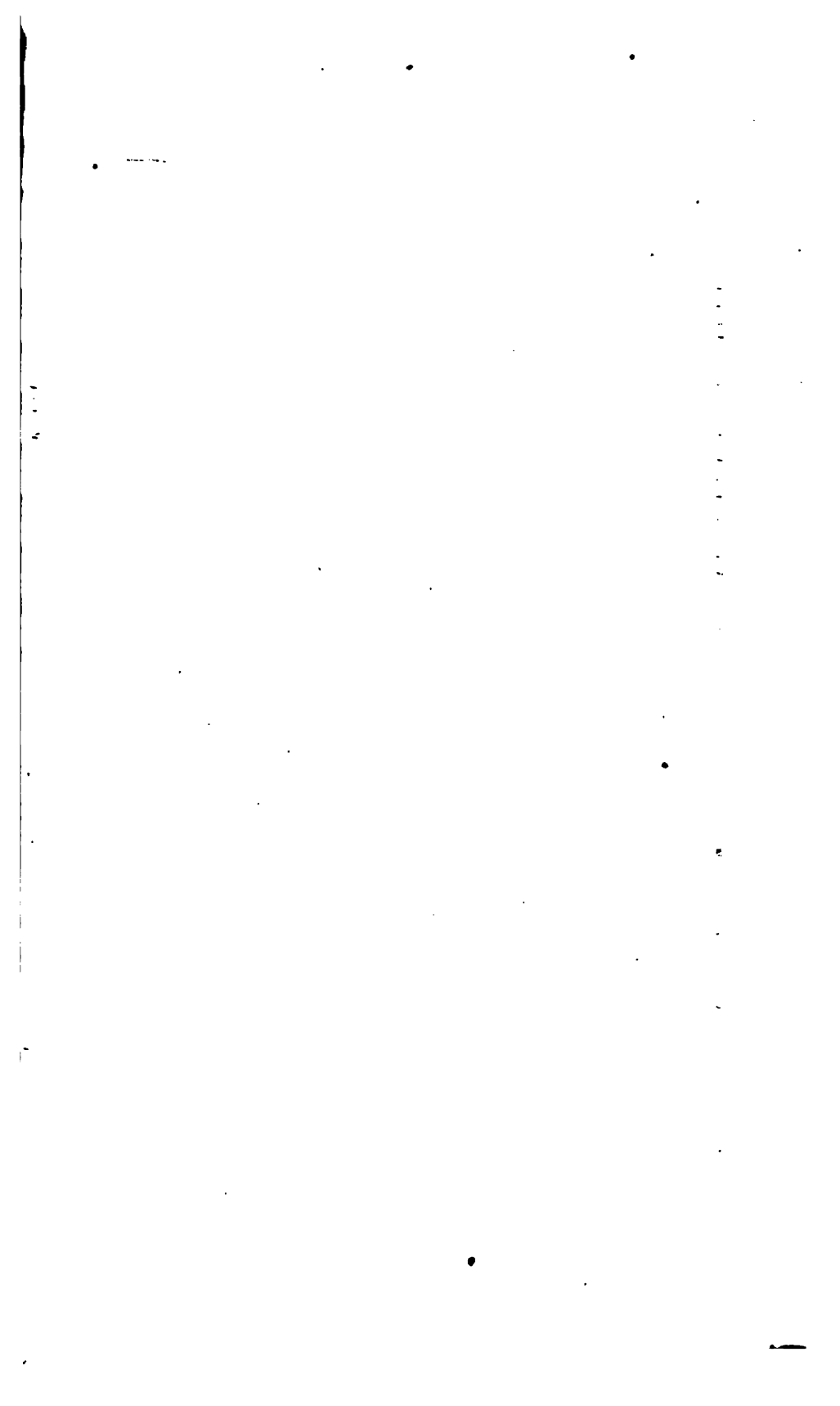
See **CONTRACTS ; HIGHWAY ; TAXATION.**

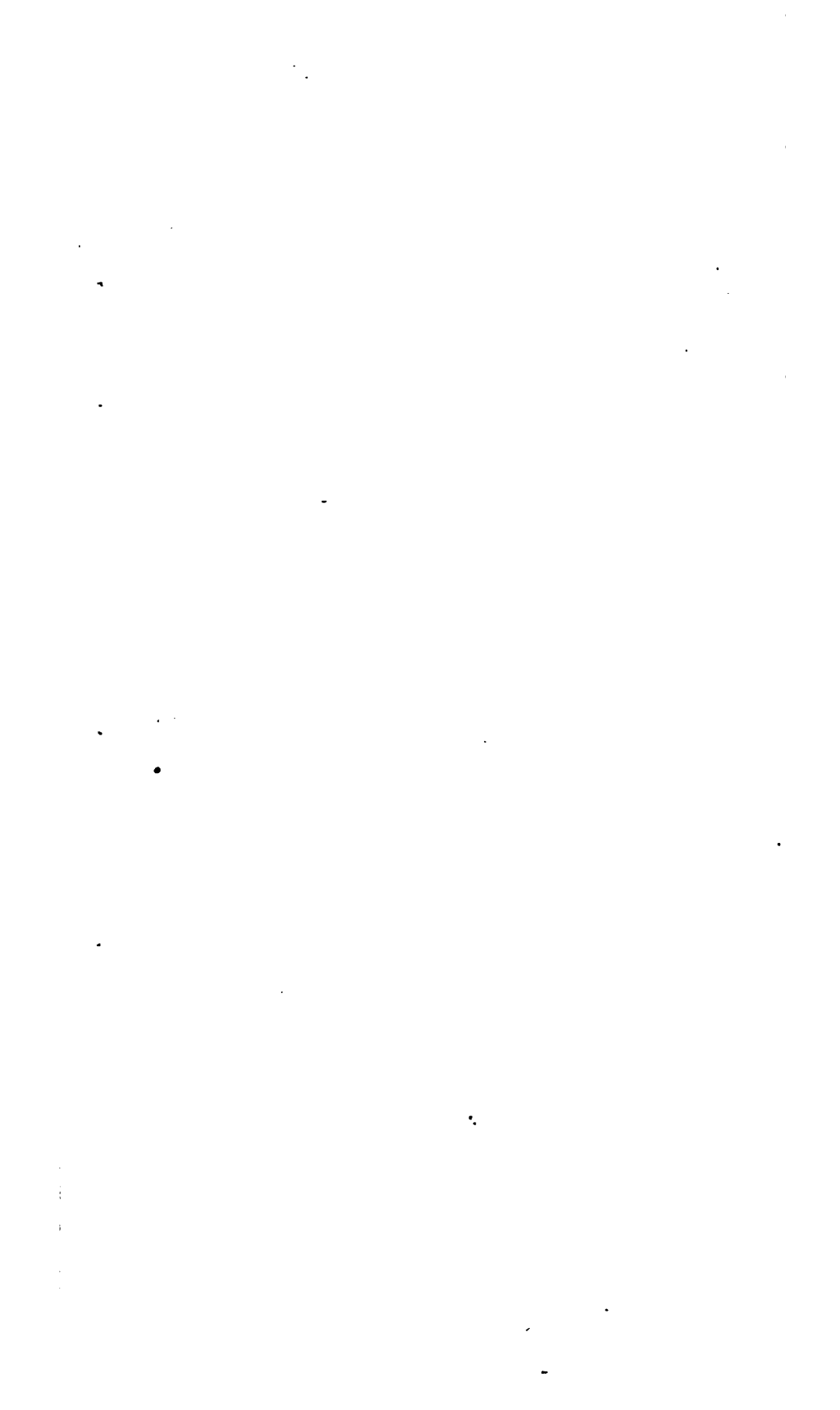
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